United States Court of Appeals

for the Second Circuit

APPENDIX

74-1404

ORIGINAL

In The

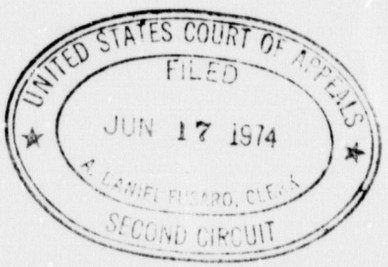
United States Court of Appeals

For The Second Circuit

FRANK BERNARDINI,

Appellee,

vs.



REDERI A/B SATURNUS,

Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Appellee.

Appeal from the United States District Court for the Southern District of New York.

JOINT APPENDIX

Volume II, pp. 376a - 752a

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treat and examine Mr. Bernardini back in 1969?

MR. TESTA: Objection.

MR. STEARNS: Objection.

THE COURT: Sustained.

Q Doctor, did you have that document in front of you when you were testifying in response to Mr. Testa's questions?

MR. TESTA: Objection.

THE COURT: State your grounds, Mr. Testa.

MR. TESTA: I am objecting to this question. The doctor had before him his reports when he testified. When he testified in answer to my questions, Dr. Tagliagambe had before him his, Dr. Tagliagambe's, reports.

THE COURT: I will sustain the objection as to form, but I will permit a further inquiry in this area.

BY MR. AUSLANDER:

Q Was this document, doctor, in your possession as part of your papers when you were testifying and being questioned by Mr. Testa?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Did you review that document before you came into court today?

A I looked at it, yes, sir.

Q Is that part of your office records concerning this man?

A It is part of my records, sir.

MR. AUSLANDER: I offer it in evidence.

MR. TESTA: Objection.

THE COURT: Let's proceed to the side bar.

(At the side bar.)

MR. TESTA: If your Honor please, I am objecting to this document on the grounds it is a report of another doctor. Whether it is part of his office record or not is immaterial. The doctor testified on the basis of his own examination and he testified from his own records and he did not rely on that report.

THE COURT: I would agree with you in theory but his testimony, as I recall it, did not come out that way.

MR. TESTA: It certainly did. I had it separated for that specific reason so it was not part of his records. When he testified he referred to his own reports. He did not refer to that. His examinations were not based upon that report and his testimony was based on his own examinations and his own conclusions that he came to and it is proper.

THE COURT: The probative value of it is minimal. In fact, it appears to me it is overweighed by the prejudicial effect of the document as I understand the document, but I will hear from Mr. Auslander.

MR. STEARNS: If I could just say I join in what Mr. Testa says. This is rank hearsay and the fact somebody has something in his file is no reason for the admission of such document in evidence when the man is available.

MR. AUSLANDER: Except, your Honor, that the doctor said that he reviewed the document before he came and testified. It is part of his office records concerning this man. I will ask him again.

THE COURT: It is not a record made and kept by him in the regular course of his business. It may have been received by him from a third party. That would permit you to get the third party in to testify.

Objection sustained.

(In open court.)

BY MR. AUSLANDER:

Q Doctor, what is a sprain?

A It is an indirect type injury where there is a little stretching of the soft tissues of the area

involved.

Q What is a tearing of the tissues?

A In a real severe type condition, there could, but there was none in this case.

Q I didn't ask you that, did I? Did I ask you if there was any in this case? Please don't volunteer something. You have been in the courtroom many times --

THE COURT: Please. I don't want any speeches made by any counsel. Questions only.

Q Doctor, how many times have you been in court testifying this year?

A Half a dozen times, perhaps.

Q How many reports like this have you made, similar to this, this year?

A Similar to what?

Q Similar to these reports.

A These reports are sent regularly in all cases.

Q How many have you made?

A If you allow me to finish I will try to answer your question.

Q All I am asking is a number.

THE COURT: Let the doctor try to answer the question.

MR. AUSLANDER: It just calls for a number.

THE COURT: Maybe you think it calls for a number. I will decide that when he answers. If it is not responsive you can move and I will strike it.

MR. AUSLANDER: It may be prejudicial.

A I will have no real way of answering that question as to numbers, but I will say there were a substantial number of such reports sent out during the course of the year.

Q Over a thousand?

A I would say yes.

Q Over 5000?

A That I wouldn't know. I doubt it.

Q About 3000?

A I would say so.

Q And you make up these type of reports of over 3000, or approximately that number, concerning longshoremen, isn't that true?

A That is correct, sir.

Q But you don't call yourself a company doctor?

MR. TESTA: Objection.

THE COURT: Sustained.

MR. TESTA: I askyour Honor to instruct the jury --

rka Tagliagambe-cross

THE COURT: I suggest we get on with our inquiry here. The jury will of course disregard questions to which objections are sustained. Please wipe those from your mind. The only evidence comes from the witness box or the mouth of the witness and from the exhibits in evidence.

Q Doctor, you said that the man picked your name from a panel of doctors, is that right?

A That is the way the law has established the conduct of these type of situations.

MR. AUSLANDER: Would you mark this for identification.

(Plaintiff's Exhibit 2 was marked for identification.)

Q Plaintiff's Exhibit 2, can you identify that?

MR. TESTA: Can we see it before anything further is done?

THE COURT: He just wants to identify it.

A Yes, sir.

Q What is it?

MR. TESSA: May we see it?

THE COURT: He hasn't offered it yet. If he wants to hold off he is entitled to hold off.

A This is a slip which authorizes me, which

gives me authorization to treat this patient.

Q Is it on your letterhead?

A That is correct.

Q Who did you give this slip to?

A These slips are kept on the piers, in some of the piers as well as others, and the man makes a report and the timekeeper at that particular pier who makes the report then sends this man if he is coming to me with such a slip, indicating to me that I am permitted to treat this man, that he did get hurt during the course of his work.

MR. AUSLANDER: I offer it in evidence.

THE COURT: Show it to the other side.

MR. TESTA: I would object to this. If you want my reasons, I would like to approach the side bar.

THE COURT: Of course.

(At the side bar.)

THE COURT: Let me see it, please.

MR. TESTA: If your Honor please, this is merely a statement requesting that medical be rendered to this man indicating a date and a place, that the employer is ITO, and it is signed by the timekeeper. It's no indication that anything happened or it happened in

the course of his employment or he really did or was injured on that date.

MR. STEARNS: I would like to object just for that reason.

MR. AUSLANDER: That is not the reason I am offering it.

THE COURT: Explain to us the reason for your offer.

MR. AUSLANDER: The doctor said this is his slip with his letterhead that he puts on the piers and that the timekeepers or whoever make these out and send them back to the doctor. It's just an indication of the doctor's credibility as to whether or not he really is a company doctor.

THE COURT: I am not sure that this is a major point but I have just looked at the document. I will overrule the objection.

MR. TESTA: May I state, your Honor, the fact that there may be such a thing in the timekeeper's possession does not mean he may not have other doctors' slips?

THE COURT: He indicated already he is on a panel.

MR. STEARNS: I don't see the relevance of

this.

THE COURT: It may be cumulative but it's on cross examination. I find sufficient relevance to overrule the objection.

(In open court.)

THE COURT: The objection is overruled. The document should be marked in evidence.

(Plaintiff's Exhibit 2 was received in evidence.)

BY MR. AUSLANDER:

Q This is a form on your letterhead?

A Yes, it is.

Q This is a blank form that you give to the piers, to the stevedores?

A The ones I service, yes.

Q When a man is injured, one of these forms is filled out by the stevedore for the man to come to you?

A If he is going to come to me, that form is sent to me. If he is going to another doctor other forms are used in any different number of ways.

In other words, this is one form that serves the purpose for those people that are going to be sent to me for treatment or desire to come to me for treatment from that panel.

Q Doctor, the 21st Street pier in Brooklyn, is that still in operation?

A Yes, sir.

Q Isn't it a fact, sir, that any and all longshoremen who are hurt on that pier go to your office for treatment?

A It is not a fact, sir.

Q Can we say 90 per cent?

A No, you can't.

Q Doctor, when you were discussing your report of October 31st and Mr. Testa asked you what your findings were at that time, I made a note here, and you correct me if I am wrong, that you said definite clinical improvement; do you recall that?

A That is right.

Q I show you your report of October 31st and I ask you to point out to me on that report where there is the word "definite."

A On this report there is no such word "definite." It says, "Clinical improvement noted." I may have it on my folder, I don't know.

Q On your folder. Is there anything on your folder that says "definite"?

A No, that adjective is not here.

Q So in response to Mr. Testa's question you threw that in gratuitously?

MR. TESTA: Objection.

MR. STEARNS: Objection.

THE COURT: Sustained.

Q Did you throw that adjective in gratuitously?

MR. TESTA: Objection.

MR. STEARNS: Objection.

THE COURT: You just asked the question. I sustained an objection. You asked just about the same question. Sustained.

MR. AUSLANDER: I am sorry. I thought it was to form, not to substance.

THE COURT: It is as to form and the form remains deficient.

Q Doctor, as part of your treatment, the x-rays and the physical therapy and so forth, did you make use of any other report?

A Make use of a report in what way?

MR. STEARNS: I object to the form of the question.

THE COURT: Do you understand the question?

THE WITNESS: Not altogether.

THE COURT: He doesn't understand your ques-

Q Did you use for reference, as part of your examination and your reports and treatment of this man, any other report?

A Yes, sir.

Q Did you make use of a report from Dr. Magliato?

A I did, sir.

MR. AUSLANDER: I will offer it in evidence.

MR. TESTA: Objection. The same objection.

THE COURT: He says he made use of it.

MR. STEARNS: May I be heard at the side bar?

THE COURT: Indeed you can.

(At the side bar.)

MR. TESTA: It is the same objection I made before. The fact he had this report in his records or if he looked at it or if he referred to it is not the critical point here. The question is whether or not he based his opinion on it, and he did not; he based his opinion upon his own reports.

THE COURT: He has said he made use of it in connection with his treatment of the man.

MR. TESTA: Of course, because he is

directed by the Department of Labor to continue treatment based upon this report; but the point is if you want this doctor's testimony all you have to do is bring him in here.

MR. AUSLANDER: That is not the point.

MR. TESTA: My point is this. If he wants Dr. Magliato's testimony, all he has to do is bring him in here to testify. He cannot get this in through the back door by asking Dr. Tagliagambe if he has it in his records or if he read it or referred to it unless the doctor relied upon this report.

THE COURT: He just said that he made use of it in connection --

MR. TESTA: Whether he relied upon it.

THE COURT: Do you want a voir dire? I will give you a voir dire.

MR. TESTA: I am making an objection.

MR. STEARNS: What do you do as a practicing lawyer when you have on one hand a desire to inform the doctor of everything possibly significant and, two, if you send him a report simply because he is a conscientious guy, he reads it and it is going to go into hearsay as rank hearsay?

MR. AUSLANDER: He used it for treatment.

MR. TESTA: There is an improper foundation.

Unless he establishes a foundation from eliciting from Dr. Tagliagambe that he relied upon it --

MR. AUSLANDER: That is not the magic word.

MR. TESTA: He has the burden of establishing a foundation for this report unless he establishes it is not admissible.

THE COURT: From what I have heard so far I am constrained to admit it but in view of your comments I will give you a voir dire at this point which might persuade me.

Without a voir dire, based on my recollection of the testimony I would be inclined to admit it.

MR. TESTA: My burden is not to establish it, it is for him to establish the foundation. Let him ask the questions. If the doctor says he based his findings on that report I will withdraw my objection.

MR. AUSLANDER: As long as you say, as I asked him, did you use it -- I forget the substance -- the basis of your treatment and examination and so forth and he said yes --

MR. TESTA: But for what purpose, for what reason? If he only used it because he had a directive from the Department of Labor to treat the man, it is an improper foundation.

THE COURT: Let me suggest this. I am prepared to admit it. However, I will give you a voir dire, Mr. Testa if you wish to establish what you are just arguing because my recollection of the testimony up to this point differs from yours and I think that he has testified that he utilized it in connection with his treatment of the man. If his answer to that question is no, he did not, I would keep it out.

MR. AUSLANDER: Go back to what he said.

THE COURT: I am going to let it in unless you take me up and ask on the voir dire.

(In open court.)

VOIR DIRE EXAMINATION

BY MR. TESTA:

Q Dr. Tagliagambe, much reference hasd been made to a report of Dr. ~~Tagliagambe~~ Magliocco that you apparently had in your file.

Did you utilize that report in connection with your treatment of Mr. Bernardini?

A It did not influence my treatment or opinion in any way. I used it respectfully in carrying out some of the directives or recommendations, should I say, contained therein, such as taking another x-ray of this gentleman's shoulder in a manner that the doctor described,

and I thought there was no objection to that, and the heat treatment was extended a few weeks more because of this report.

Q Was your treatment --

MR. AUSLANDER: If your Honor please, that is not an answer to the question.

Q Was your treatment of Mr. Bernardini or your findings that you have testified to today in any way based upon that report?

A No, sir.

MR. TESTA: I renew my objection.

MR. AUSLANDER: I still renew my application to offer this in evidence based on the doctor's own testimony.

MR. TESTA: I renew my objection.

THE COURT: Objection overruled.

(Plaintiff's Exhibit 1 was received in evidence.)

BY MR. AUSLANDER:

Q May I ask you, Doctor, with the permission of the court, who Dr. Magliato is?

MR. STEARNS: I object to this as totally irrelevant.

THE COURT: It is irrelevant. Objection

sustained.

As far as we are concerned, there is a doctor by the name of Dr. Magliato, period.

MR. AUSLANDER: This is what I wanted to find out.

THE COURT: Beyond that, this gentleman I don't think is the source of the further testimony you seek to elicit. Counsel has made an objection. Objection sustained.

Q Doctor, the report that is in front of you, Plaintiff's Exhibit 1, is from Dr. Magliato, is that not so?

A His name is attached to that report. I assume it is.

Q Is it signed by him?

A I assume it is, I don't know his signature.

MR. TESTA: If your Honor please, the doctor said he doesn't know Dr. Magliato's signature.

THE COURT: I heard him.

Q Doctor, to whom is that report directed?

THE COURT: It is in evidence. You can read from it.

Q It is directed to the United States Department of Labor, 321 West 44th Street, New York, New York, and

rka Tagliagambe-cross

the first paragraph -- "Attention Mr. J. P. Conway, Assistant Deputy Commissioner." The first paragraph:

"Dear Mr. Conway:

"On 11/17/69 I examined the above-named patient in consultation at your request."

That is in reference to Frank Bernardini against ITO.

Is that correct, Doctor, he is referring to Frank Bernardini?

A Yes.

Q And this document was sent to you in reference to Mr. Frank Bernardini, is that not so?

MR. TESTA: I will object to Mr. Auslander asking Dr. Tagliagambe to construe something that has now been admitted into evidence. It speaks for itself.

THE COURT: Sustained. The document speaks for itself.

Q Was this document sent to you in reference to Mr. Bernardini?

A It was not sent to me at all. The claimant brought it, the patient brought it to me during the course of treatment of him.

Q The patient brought this to you?

A That is correct, sir.

Q Mr. Bernardini brought this to your office, this letter?

A May I see it? That is correct, sir.

Q You read the letter?

A At the time I did, yes.

Q It is a medical report, as a matter of fact, isn't it?

A It is.

Q It's a medical report connected -- concerning, rather, an examination and findings of Mr. Bernardini?

MR. TESTA: I will object to asking Dr. Tagliagambe to say what this is.

THE COURT: You offered it in evidence.

MR. AUSLANDER: I don't want to read the whole thing now. It's getting late.

THE COURT: You could refer to it in your closing argument. It could be shown to the jury now, later, at any time.

Q Were the findings by Dr. Magliato consistent with the findings you made of your examinations of Mr. Bernardini?

MR. TESTA: Objection, if your Honor please.

THE COURT: Sustained.

Q Doctor, did you find swelling --

MR. TESTA: Objection if he is going to read from a document and ask Dr. Tagliagambe --

THE COURT: I think it is perfectly proper if he asks what he found.

MR. TESTA: He is reading from this document.

THE COURT: He can read from anything he wants. He can read from his notes and ask questions.

Q Doctor, when you examined Mr. Bernardini's right shoulder, did you find swelling and tenderness over the right acromio clavicular joint?

A When he first appeared at the office on the date of the accident he had generalized tenderness in the whole shoulder region, not specifically over the acromio clavicular joint.

Q Did you find swelling?

A Initially there was slight swelling.

Q Although you don't mention that in your report?

A No, I don't. It is part of the contusion.

Q When you saw him last on November 3rd did you find swelling?

A No, the swelling had subsided.

Q So on November 3rd the swelling had sub-

rka Tagliagambe-cross

sided when you examined him?

A That is correct.

Q And on November 17th --

MR. TESTA: Objection if he is going to say something happened.

MR. AUSLANDER: I am going to read from this in evidence.

MR. TESTA: I will object to him asking this doctor what this doctor said.

THE COURT: I don't think there has been a question finished.

Q On November 3rd you did not find swelling of the man's shoulder, is that correct?

A That is correct.

Q I read from this document concerning an examination of November 17, 1969 of Mr. Bernardini.

"Physical examination of the right shoulder reveals swelling and tenderness over the right acromio clavicular joint. "

Doctor, did you test this man for rotation internal or external rotation, of the man's arm?

A Yes, sir.

Q Did you find any restriction on November 3rd?

A If there was any, it was all active restriction

on his part.

Q I read from this document. Internal rotation is restricted by about 25 per cent. External rotation is restricted by about 10 per cent.

Doctor, on November 3, 1969 did you find this man disabled?

A I did not.

Q I read from this document. He was disabled --

MR. TESTA: Objection. I think this is improper cross examination. The doctor testified that he made no such findings.

THE COURT: The doctor is here. He is subject to being cross examined.

The jury will weigh his credibility and he is here and he is testifying before you against this piece of paper that is being read from. It's up to you ladies and gentlemen, you are the triers of the fact.

You may proceed, sir.

MR. AUSLANDER: That is all.

CROSS EXAMINATION

BY MR. STEARNS:

Q Dr. Tagliagambe, you said,if I understood you correctly -- and correct me if I didn't, you said on November 3rd if a man had restriction of motion it

would have been active. What did you mean by that?

A You and I can restrict all motions of any part of our body if we so desire. That is, active motion is the motion that a person carries out on his own. Passive motion would be motion that I would try to carry out in examining a patient so that there is a distinction between what you voluntarily do and what may be involuntarily carried out.

Q Do you consider passive restriction of motion to be more significant?

A Yes, sir.

Q And you say that if this man, Mr. Bernardini, on November 3rd, five days after the accident, had any restriction of motion, it was active, he was doing it himself?

A That is correct, sir.

Q You said you had independent recollection of this man's history, if I understood you correctly?

A If I may clear the air on that, in that particular office we have no secretary present so this history must be taken by one of the doctors, myself or my associate. If he had been at another office, that may not have been the case. The initial history may have been taken by the nurse and reviewed by myself, but

rka Tagliagambe-redirect

Q Dr. Tagliagambe, even though you treated this man after November 3, 1969,you had an opinion with respect to his ability to work, did you not?

A I did, sir.

Q What was that opinion?

A My opinion as previously stated, he was able to return to work as of November 3, 1969.

Q Am I correct in saying that you only treated him because of the fact that you were requested to do so?

A Pursuant to that report, yes, sir.

Q And not because you thought that any treatment was necessary?

A That is correct,sir.

Q And you didn't find any swelling or tenderness over the right acromio clavicular joint when you discharged him and found him fit to return to work?

A That is correct.

Q You found no limitation of motion on internal rotation, did you, doctor?

A As I testified previously, there is such a thing as active restriction of motions that you or I or anyone else can carry out and restrict, and it was my opinion, based upon all the factors present, he was able to work and carry out his work and go home as of

Q What is the difference between subjective and objective findings?

A Subjective complaints is the way I would rather put it than findings in contradistinction to objective findings. Subjective complaints are those registered by a patient. He or she may tell us there is pain or tenderness when we palpate a certain area. These are complaints registered by a patient.

Objective findings are those that are specifically made by an examining doctor in the course of his examination of that patient and this is the difference. One is registered by a patient, the other is found by a doctor.

Q What is internal rotation?

A It is one of the motions of his shoulder.

Q How is that done, would you tell us?

A You internally rotate this way and you externally rotate the other way.

Q Can that be done by the patient, restriction of that motion?

A Yes.

Q Can he do that without the doctor knowing it?

A If the doctor -- yes, the answer to that is

Q So that when you say it is subjective, it means something that the patient does as opposed to something that the doctor finds?

A That is correct, sir.

Q And the patient then could do this, he could say, "I can't move my arm any further than this"?

A That is correct.

Q Or "I can't move it any further the other way"?

A That is correct.

Q Didyou take any x-rays after November 3, 1969?

A I did, sir.

Q Did those x-rays show anything?

A They did not, sir.

Q Were you requested to take further x-rays to rule out any injury to the acromio clavicular joint?

A Such a recommendation was made, sir, at the time of that examination.

Q And you did take such x-rays?

A Yes.

Q Didthey rule out any injury of the acromio clavicular joint?

A They did.

Q So there was nothing wrong with the shoulder?

A From an x-ray point of view,that was right?

Q What is crepitation?

A It's a little sound that is heard in the movement of a joint.

Q You didn't hear any such sound?

A I did not.

Q You discharged him on November 3, 1969. Was he able to go through all the arm motions?

A I didn't discharge him on November 3rd. I stated he was able to work. He was finally discharged on 12/1/69.

Q On November 3, 1969 he was able to move his arm in all the various directions?

A In my opinion, he had sufficiently improved to be able to return to work. There was some active restriction of motion manifested at that time which I felt were actively performed and did not deter me from my arriving at my conclusion.

Q When you say actively performed, you mean by Mr. Bernardini?

A It's an active part of motions on the person's part.

MR. TESTA: Thank you.

RECROSS EXAMINATION

BY MR. AUSLANDER:

Q Let me see your notes one more time, doctor.

Where anywhere do you have a notation that the man had active restriction of motion on 12/3/69?

A 12/3/69?

THE COURT: There are two dates, November 3rd and December 1st.

Q December 1st.

A December 1st?

Q You just said to Mr. Testa, I believe, that at that time you felt he was able to go back to work and he had at best active restriction of motion at that time.

MR. TESTA: That is November 3rd.

THE COURT: Perhaps we can inquire.

Q Let me reframe the question.

On December 1st did you feel that he had active restriction of motion?

A I felt he had no restriction of motion at all, either active or passive.

Q Did you just tell us that on December 1st you thought he had active restriction of motion?

A On November 3rd. I said if there was

restriction of motion it was active restriction of motion rather than passive restriction of motion.

Q On November 3rd? Where does it say that?

A The notation I made refers only to the presence of subjective complaints and not objective findings.

Q Where does it say anywhere in your report that this man had active restriction of motion?

A My report shows that he had no residual objective findings.

Q Doctor, don't fence with me.

THE COURT: Why don't we get the question and let's try and get an answer.

Q Is there anywhere in your report that says at any time that the man had active restriction of motion? Yes or no.

A Specifically, no. I didn't make any specific notations in that manner, sir.

Q So what you are telling Mr. Testa that this man was holding back, in effect, there is not even a notation to that effect in your report, is that not so?

A If there was a true finding of such, I would note it. If there is no such finding, I would not note it.

Q That is not what I am asking you.

You were just telling Mr. Testa and this court and jury that this man was holding back on his restriction of motion, he was doing it himself, voluntarily and in response to Mr. Stearns' questions?

A That is correct.

Q Where in that report does it say he was actively restricting motion?

MR. TESTA: Objection. It doesn't have to be in a report.

THE COURT: Overruled.

Does it say that in your report?

THE WITNESS: I already testified I made no specific notation.

Q Did you make any general notation of those words? Yes or no?

A No.

Q Is swelling an objective sign, doctor?

A If there is swelling, it is.

Q Would swelling restrict a man's motion?

A Not necessarily.

Q If it is on the acromio clavicular joint?

A No, it would not?

A No.

Q Where is the acromio clavicular joint?

A It is at the connection of the collarbone with the acromium. It is not part of the shoulder joint. It is this little bone on this area connected with the clavicle.

Q You are telling me if I move my arm this way or that way and I hold my hand here at the joint there is not going to be motion?

A I don't know what you are talking about. I wonder if you do.

Q Are you telling me if I hold my hand here on the acromio clavicular joint, if it is swollen, I am not going to have some restriction of motion?

A It doesn't necessarily mean that at all. Having swelling doesn't deprive you of moving your shoulder.

Q I am asking you whether it is going to limit the complete movement of my shoulder.

A The answer is no per se, as a sole finding.

Q Doctor, will the swelling in this area of the joint give me some restriction of motion?

A Of what motion?

Q Of internal or external rotation.

A The answer is no. I have answered that already and the reason for that is it is not part of the

shoulder joint and these motions that you are referring to are those that are carried out through the shoulder joint which the acromio clavicular is not part of.

Q And if there is tenderness over there would that give me some restriction of motion?

A I don't go by one particular thing. I take the whole clinical picture together. You are going into isolated findings if they are such findings and we can't draw conclusions from them.

Q We don't know what your findings are?

A I know what my findings are.

Q You have been telling us certain things that you don't even have reports on.

MR. STEARNS: Objection.

MR. TESTA: Objection.

THE COURT: Sustained. If you have a question put it to the witness. No speeches.

Q Doctor, you gave this man a lot of treatment, physiotherapy, right?

A I don't know what you mean by a lot of treatment.

Q You gave him treatment through the whole month of November?

A For the period I already testified to. If

you consider that a lot, it's a lot.

Q Through the month of November, I think you have it written down there.

A ll.

Q And you charged for all those treatments?

A I did.

Q And you are not going to take money under false pretenses?

MR. TESTA: Objection.

THE COURT: Sustained.

MR. AUSLANDER: That is all.

RECROSS EXAMINATION

BY MR. STEARNS:

Q Dr. Tagliagambe, when I questioned you a moment ago I asked you whether I had not properly heard you testify that if after or on November 3, 1969 he had restriction of motion of the shoulder and it was active restriction.

A That is correct.

Q On what did you base that testimony?

A Based on the notations that I have of definite clinical improfement on November 3rd and objective findings were minimal. In other words, I have a system in which I record certain things.

In other words, I have a system known only to me what is going on in the course of treatment of a patient. For instance, I will say there are residual complaints. If I say there are residual complaints and residual findings, it is another notation and it means something else to me and so forth.

As I go along in the course of treating a patient I make certain notations from which I am able then to reconstruct the progress note at intervals of every two weeks or so.

Q Go give the significance?

A It denotes certain things to me to enable me to submit a proper report.

Q Based on your report, what you have written down, based on the impression of the injury that this man had, there would be no reason to expect even five days after this event that there would be any restriction of motion, is that not so?

MR. AUSLANDER: Objection to the form.

THE COURT: Overruled.

A That is correct.

Q He had a very minor, minimal injury, is that correct?

A That is correct.

MR. STEARNS: Nothing further.

THE COURT: You may step down.

BY MR. AUSLANDER:

Q Doctor, you said --

THE COURT: Stand up. When you are asking questions stand up.

You may proceed.

Q Doctor, you said you had a system in which you record certain things?

A That is what I said.

Q That mean certain things to you?

A That is correct.

Q Is that some sort of a secret code?

MR. STEARNS: Objection.

THE COURT: Overruled.

A I don't know what you mean by secret. These notes are for my purpose and it serves my purpose, but they are not no secret. They are available to anyone who is entitled to have them.

Q When you say the man was actively restricting his motion and although there is nothing written there which says that, there is something else in your report that triggers off that response?

A That is correct.

MR. AUSLANDER: Thank you.

THE COURT: Any other questions?

MR. TESTA: No.

THE COURT: You are excused, doctor.

(Witness excused.)

THE COURT: May I see counsel.

(At the side bar.)

THE COURT: It is now a quarter of 6. It is obvious that we can't start Dr. Lodico tonight.

You will recall at the conclusion of our recess I was prepared to take him immediately and he was not yet present in court. Then Dr. Tagliagambe came and we took him. His examination took from the time he began until now, which is a quarter of 6. I do not think it is fair to the jury to begin Dr. Lodico at this hour becuase if Dr. Tagliagambe's testimony is an example, and as you probably have observed I do not cut off your inquiry, whether it be direct or cross or re-direct examination, it would seem to me we would be here until a very late hour.

May I inquire when the doctor will be available?

MR. STEARNS: May I go outside and ask him?

THE COURT: Yes. I would hope he could

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be here Friday morning at 10 o'clock, but if he can't be will you reporr back on the subject?

MR. STEARNS: I will.

(Pause.)

MR. STEARNS: He has told me he is leaving tomorrow morning at 8:45 and will not be back until Sunday, which is, I suppose, the 22nd.

THE COURT: What other witness do you have?

MR. STEARNS: I have another man who is anxious to get home on the ship.

THE COURT: We will take him first thing Friday morning.

MR. STEARNS: There is no possibility, your Honor, and I say this respectfully, but is there any possibility of continuing the trial tomorrow?

THE COURT: I have changed my calendar once at your request at considerable difficulty to myself. I can't make that adjustment. He is here and it is not a question of a witness not being here.

MR. STEARNS: I fully understand your position.

THE COURT: All I can say is if the doctor can't be here on Friday it would seem to me we may have to

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finish this case, and it is going to create problems with the subsequent cases, we will have to finish the case next Tuesday. I didn't want to do that but I don't see that we have a choice.

MR. TESTA: That is all right with me.

THE COURT: Let me explain this to the jury.

Friday afternoon I have four orders to show cause returnable so it may be we will not have a full day Friday. Sometimes they have a way of condensing themselves or collapsing, but at the moment I will tell you that I have four orders to show cause returnable beginning at 2:15, plus, of course, three sentences that I think you are aware of, which I will take in the morning before I start our regular day.

MR. TESTA: Is it possible adjourn the case until Monday?

THE COURT: Monday is a holiday.

MR. STEARNS: I would like when the cross examination of the mate is concluded and when Mr. Auslander has assured us there is no further rebuttal, that final rest has come to this case, I want to send him home.

THE COURT: What is your request? Is it

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case because I want you to hear all of the witnesses.

We will not be sitting tomorrow as I indicated, so that will be some compensation for the very late hour tonight.

On Friday morning I have three sentences scheduled beginning at 9:30, 9:45 and 10 o'clock. As this morning, I would ask the jury to be here on Friday at 10 o'clock. We will go through the morning on Friday. I have four hearings presently set for Friday afternoon so there is a very good chance that you will get out early on Friday.

Monday is Veteran's day, it is a court holiday, so we would then resume following the Friday session, we would resume and hopefully conclude the case, on Tuesday, October 23rd, which is during the second week of your jury service.

Now, one other thing I would mention. It is late and I will only keep you another moment or two.

Occasionally it would appear that by some manner or other rebuke or appear to rebuke or admonish or appear to admonish one or the other counsel. It is not my intention to either rebuke or take away from the positions which they are arguing by any apparent word or

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gesture on my part. Each counsel is entitled to present his case as he sees fit. The fact that I may make rulings for or against one side should not be considered by you on the merits of the case. It is your job here to listen to the evidence, not be affected in any way by counsel or the court or what you believe may be some matters of court discipline.

Each counsel is here doing his job to the best of his ability. I want you to cut right down to the core as you undoubtedly have, undoubtedly will, and take the facts of the case and consider the facts of the case carefully on their own merits. This is not a personality contest, it is not a matter of a school program. Each counsel is here doing his best. The court is trying to do its best as well.

We have been at it for a very long day today so as you leave to return on Friday morning at 10 o'clock to this courtroom I say continue to keep an open mind on the case and when the case is given to you, judge it on its merits, on the merits of the testimony and on nothing else, and remember, in the court's view each counsel is trying to do his best.

Finally, I say do not discuss the case among yourselves or remain within the presence of any persons

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your request that we proceed as we intended to Friday at 10?

MR. STEARNS: Yes.

THE COURT: Let me suggest this under the circumstances, and I will explain to the jury what the situation is relative to Friday afternoon: We will finish that facet of it, and since they are due to come in next week I would estimate to them that we would expect to conclude the case next Tuesday.

Is that satisfactory?

MR. AUSLANDER: We will finish the plaintiff's case and the defendant's case?

THE COURT: We will do as much as we can on Friday, and I would think we will use the time available to me. If I have to stop, I will.

(In open court.)

THE COURT: Ladies and gentlemen of the jury, I had a conference with counsel relative to our schedule and we have another doctor who is wsiting. He is going out of town tomorrow morning very early and will not be back until Sunday night.

As I recall it, you ladies and gentlemen are in the first of two weeks of service, is that correct?

Here is what we will do in connection with this

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who may be discussing the case.

The jury is excused with the thanks of the court and you are requested to return on Friday morning at 10 a.m.

(Adjourned to October 19, 1973.)

rkbr 1

Frank Bernardini
v
Rederi A/B Saturnus 70 Civil 3075
v
International Terminal
Operating Company, Inc.

New York, October 19, 1973
Room 1306 - 10:15 a.m.

- - -

(Trial resumed.)

- - -

(In open court; jury present.)

THE COURT: I understand counsel would like to speak with the Court briefly.

(At the side bar.)

(In open court.)

THE COURT: Mr. Stahl, would you resume the stand and as soon as Mr. Testa returns to the courtroom, we will begin, or resume with your examination.

THE CLERK: Mr. Stahl, you are still under oath.

MR. AUSLANDER: May I hear the last few questions?

THE COURT: Mr. Kaufman informs me his notes are downstairs. I will read you back my last few notes and if that can be helpful, fine. If not, Mr. Kaufman will go down.

MR. AUSLANDER: I will proceed but I hope your

rkbr 2 Stahl-cross

honor will forgive me if I am a little repetitive.

THE COURT: Yes.

R U N E S T A H L, resumed.

CROSS EXAMINATION

BY MR. AUSLANDER CONTINUED:

Q What was the length forward to aft of the No. 4 hatch?

A The length would be around 8 meters.

Q And that is substantially less than the length of the hatches in the forward part of the ship, is that not so?

A The length of No. 2 and No. 3 hatch is longer than No. 4 hatch.

Q Much longer?

A About 4 meters.

Q What did you say the length was of the No. 4 hatch?

A About 8 meters.

Q It is approximately 24 feet?

A Approximately, yes.

Q Half of that would be about 10 or 12?

A 10 feet, yes.

Q 10 or 12 feet?

A Yes.

Q What time was it that you came on duty that morning?

rkbr 3 Stahl-cross

A My work started at 7:30 in the morning.

Q When you started at 7:30 in the morning, where did you go?

A I was watching the crew open the hatches all over the vessel.

Q Did you eat breakfast first?

A I had breakfast at 7 o'clock.

Q You came onto the main deck and you were watching the crew open up the hatches?

A Yes, sir.

Q Where were you standing to watch this?

A I was not standing, I was going around watching the crew open the hatches.

Q Walking to the No. 1, the No. 2, the No. 3, to the No. 4?

A Yes, sir.

Q Where were you at 8 o'clock?

A I cannot say exactly where I was at 8 o'clock.

Q Where were you at 8:15?

A On deck.

Q Where?

A I cannot say exactly. I was not counting the minutes.

Q Where were you at 8:30?

A I was on deck toc.

Q Where?

A I cannot say exactly. I was always going around.

Q Where were you at 8:45?

A 8:45 I think I was at No. 4 hatch.

Q You think or you know?

A I think 8:45 I was at No. 4 hatch.

Q Where?

A At the forward end of No. 4 hatch.

Q Starboard or port?

A Starboard side.

Q That is the right-hand side?

A The inside.

Q Inshore side?

A Yes.

Q Where at the forward end of No. 4 were you?

A Forward end of No. 4 hatch on the inshore side just close to a staircase going up to boat deck.

Q Where is that staircase located in reference to the midship house?

A On the starboard side.

Q Where on the starboard side?

A 3 feet from the starboard side.

Q Where?

rkbr 5 Stahl-cross

Where on the starboard side of the house?

MR. STEARNS: There are pictures in evidence.

MR. AUSLANDER: I wasn't asking you, Mr. Stearns.

THE COURT: No colloquy.

A The staircase was on the after end of the midship house, the starboard side.

Q The after end, the back end?

A Yes.

Q How long were you there?

A I had been down about ten minutes.

Q What were you doing?

A I was watching the stevedores, the longshoremen.

Q What were they doing?

A I think they were re-rigging.

Q You think or you know?

A I am not for sure, but I think they were re-rigging. There were two men working on the offshore side with the derricks.

Q With the boom?

A Yes.

MR. TESTA: If your Honor please, I didn't understand that answer. Did the witness say re-rigging?

THE COURT: That is what I understood.

THE WITNESS: Yes.

rkbr 6 Stahl-cross

Q Pulling on the lines and moving the booms around?

A Not moving around. Moving up or down.

Q That is around.

How were you dressed that morning, was it cold?

A I cannot say it was cold. I was dressed in a khaki uniform, a jacket without any insignia.

Q Were you wearing a hat?

A No.

Q Did you have your beard?

A No, not at that time.

Q You say that you were standing for about ten minutes at a quarter of 9 at about 3 feet from the end of the midship house on the starboard side, is that right?

A That is right, yes, sir.

Q With people coming up and down the gangway?

A Not that I could watch from my place.

Q Not that you could watch?

A I could not watch the gangway from my place.

Q When first did you see Mr. Bernardini?

A When he approached me.

Q When, time?

A Around 8:15.

Q 15?

A 50.

Q Ten minutes to nine?

A Ten minutes to nine.

Q Where were you exactly when you first saw him?

A The place I told you before, just close to the ladder going up to the boat deck in the after end of the midship house

Q Here?

A Farther off. A little bit more to the center of the ship.

Q How was he dressed?

A I cannot remember.

Q Did he have a hat on?

A I cannot remember.

Q Did he have a beard?

A If I have a beard?

Q Did he have a beard?

A I cannot remember.

Q When you first saw him, how far was he from you?

A Around 5 feet.

Q In what direction?

A He was going aft.

Q Coming towards you?

A Yes.

rkbr 8 Stahl-cross

Q He was coming thisway to where you were standing?

A Right, sir.

Q Then you say that he had a conversation with you?

A Yes, sir.

Q Was it more than one question or was it a long conversation?

A It was only one question.

Q Did you answer him?

A Yes.

Q After this conversation that you said you had with him, did he go off in this direction across the ship?

A Yes, sir.

Q Did you keep your eye on him all the time?

A No, sir.

Q After he left you and started walking across the ship, how long did you keep your eye on him?

A Till he walked over to the other side.

Q Where the men were?

A Yes.

Q And then you stopped looking at him?

A After that I don't look at him any more.

Q When was the next time you say you saw him?

A When he was coming on the inshore side of the vessel coming against me.

Q You were still in this position right about here? (Indicating.)

A Right.

Q And he was walking towards you?

A Right.

Q Toward the inshore side?

A Right.

Q Where was he the first time you saw him after you stopped looking at him when he went around to where the men were on the offshore side?

A He was just in the after end of No. 4 hatch.

Q Right here?

A A little bit more aft.

Q Right here?

A A little bit more aft.

Q Back here?

A Yes.

Q How many feet away,would you say?

A About 10 meters.

MR. STEARNS: Can we have that in feet?

Q Do you know that that is in feet?

A That would be around 30 feet.

rkbr 10 Stahl-cross

Q How much time had passed from when you last took your eyes off him when he started walking around here until you first set eyes on him again?

A A very short time.

Q 30 seconds?

A Between 30 seconds and one minute, not more.

Q Was there anything blocking your view from where you were standing where you say here and you saw him here (indicating)?

A Nothing blocking my view.

Q Open?

A Open, yes.

Q Did you continue to keep him under observation?

A Yes, sir.

Q You were standing right in the middle of the deck? You weren't hiding?

A No, I wasnot hiding.

Q You were out in the open?

A In the open.

Q Wearing your uniform? Your khaki uniform?

A It was not a uniform.

Q Khaki?

A Khaki trousers.

Q You weren't behind a wall or crouched down?

A No, not hiding.

Q And you say he came walking right toward you?

A Yes, sir.

Q How much distance was there between where you were standing and he when he came about to the corner of the inshore after end of No. 4 hatch?

A Around 30 feet.

Q And nothing was in the way that would hide him from you?

A Nothing.

Q You say that he stopped around there and started looking around?

A Not in the after end of No. 4 hatch.

Q Where did he stop to look around?

A In the middle of No. 4 hatch.

Q And you say he stopped to look around?

A Yes.

Q How far was he from where you were standing when he stopped to look around?

A About 20 feet.

Q And still there was no cargo or anything, you were still standing there as big as life?

A Yes.

Q You weren't hiding?

A I wasn't hiding.

Q You weren't hiding any cargo?

A No, sir.

Q How big are you?

A 182.

Q How tall?

A 182 will be five feet ten inches, 11 inches.

Q How much do you weigh?

A I cannot count in pound. I weight 92 kilos.

Q Were you about the same weight then as you are now?

A Yes.

Q As broad across then as you are now?

A Yes.

Q Would you stand up a moment?

A Yes.

Q Then you are telling us that when he was some 20 feet from you, he looked around then lied down on the pallets and started yelling?

A Right, sir.

Q And you say you went over to him?

A I went over to him, yes.

Q Let me ask you this, Mr. Stahl, just for a moment -- by the way, are you a captain?

rkbr 13 Stahl-cross

A I am a captain. I have a captain's license.

Q Captain Stahl, what is the job of the first officer -- you were first officer at the time, first mate?

A Yes, sir.

Q What was the job of the first mate on the Svensksund back in October of 1969 when the vessel was tied up at the pier and these cargo operations were going on, what was your job?

A My work was to control the vessel's crew, the working of the vessel's crew on deck.

My work also was to arrange the loading of the vessel, distribute the cargo for different ports in different hatches, keep look of the safety on board the vessel.

Q What is that?

A Look for the safety on board the vessel.

Q The safety?

A Yes, sir.

Q Go on.

A That is in general what I have to do.

Q When you say arrange for the cargo, that means, does it not, that to make sure that the right cargo goes into the right hatch, that is, cargo for No. 1 will go in No. 1 and cargo for No. 2 will go in No. 2 and so forth?

A Yes.

rkbr 15 Stahl-cross

A I will, yes, sir.

Q And if there was something that caused an accident and you didn't do anything to take care of it when you knew about it, the finger would be pointing at you, would it not?

A It could be.

Q If there was oil or grease on the deck where it shouldn't have been and you had done nothing about it and somebody had been hurt, you would have been held to blame, wouldn't you?

A Yes, sir.

Q How long had you been walking around No. 4 hatch before 8:50 that morning?

A I was around that hatch when the crew was opening it at 8 o'clock.

Q Did you walk around later?

A Yes.

Q At 8:15, sir?

A It could be.

Q At 8:30?

A It could be.

Q And at 8:45?

A I was staying there watching the stevedores re-rigging.

rkbr 14 Stahl-cross

Q Did you also look to see whether or not the longshoremen are doing their job properly so they are not going to damage the ship?

A Right.

Q Do you also look to see that the longshoremen are doing their job properly so that no one is going to get killed?

A That is right, sir.

Q And as a matter of fact as the first officer, isn't it your job that if you saw something going on that was wrong, you would notify the stevedore or put a stop to it, isn't that true?

A That is true.

Q Because that is your function, isn't it?

A It is one of my functions.

Q That is your responsibility?

A Yes, sir.

Q You are given that specific order from the captain, isn't that right?

A I am giving the specific order from the captain to look out for the safety on board the vessel so no accident could happen.

Q If you didn't do your job, you would be reprimanded, wouldn't you?

rkbr 16 Stahl-cross

Q You say that the man just laid down in these pallets, right?

A Right.

Q How many pallets did he lay down on?

A Three pallets.

Q Stretched out across all three?

A No. Two were close, one on top of another.

Q On top of another?

A Yes.

MR. STEARNS: He said two were close and one was on top of another.

THE COURT: No comment about it. You will have an opportunity to correct it.

Q How did he lie down, did he g down very gracefully?

A Yes, sir.

Q You were watching him all that time?

A I was watching him.

Q And he was watching you?

A Yes, I think so.

Q You then came over to him, you said?

A Yes.

Q And you said you had a conversation with him?

A After he was laying down.

rkbr 17 Stahl-cross

A Yes, he had a conversation with me.

Q And you said to him what is the matter?

A I asked him what is the matter, yes.

Q What did he say to you?

A He was claiming --

Q What did he say?

A I cannot say exactly his word but only it was an unsafe passage.

Q That is all he said?

A Yes, and he wanted to see a foreman or some man from the stevedore.

Q Did he say he wants to get a doctor?

A Nothing to me.

Q Did he say he was hurt?

A I think he was saying he was hurt too, but I cannot remember that.

Q Do you remember what he was saying was bothering him?

A Bothering him was that it was an unsafe passage.

Q What part of his body where he was hurt?

A The way he was laying, I would suspect it was the left side.

Q That is what you suspect?

A Yes.

Q Captain, did you go get somebody?

A Yes, sir.

Q Did the man leave the ship?

A I told the man --

Q I am just asking you, did the mean leave the ship?

A After I am calling other people.

Q He did leave the ship?

A He leave the ship afterward.

Q How long after you say you saw him on the pallets did he leave the ship?

A Not more than five minutes.

Q So all together he wasn't on that ship more than five minutes?

A No.

Q Have you ever seen him since?

A No, never, only in this court.

Q Have you been back to American since that date before this weekend?

A Yes, sir.

Q How many times?

A I think around 8 or 10 times.

Q On the same ship?

A Not on a ship.

Q Not on this ship?

rkbr 19 Stahl-cross

A Not on any ship. During the last two months.

Q Let me put it to you this way:

In the year 1969, did you come back to America?

A Yes.

Q On this ship?

A No, not on board any vessel.

Q What did you come back for?

A I was working as a superintendent in Lisbon after '69.

Q Superintendent of ships?

A Of ship service. It was on a line from United States and Iberia.

Q Did you come here for vacation, holiday or for work?

A For work.

Q Did the ship come back?

A I think so.

Q You don't know?

A I don'tknow for sure.

Q When did you get off the ship after October?

A I went off the ship in December.

Q When it left here in October until December at [illegible], it never came back?

A Excuse me. I was leaving the ship on the next

trip in the States when it did come back.

Q So it did come back?

A Yes.

Q When it came back, did you see the man?

A No.

Q When was it that it came back?

A The middle of December.

Q Yousay you are on vacation now?

A I am on vacation now.

Q Who is paying for your stay in New York?

A My company is paying.

Q Which company?

A Salem Shipping.

Q The company you are working for now?

A Yes.

Q They are paying for your vacation so you can be here during this trial?

A Yes, and they want to take it back from the insurance afterwards.

Q Are you paid for your meals?

A I am paid for my meals.

Q By Mr. Stearns office?

A Yes.

Q How about your entertainment?

rkbr 21 Stahl-cross

A I am paid $20 a day plus hotel.

THE COURT: Does the $20 include meals?

THE WITNESS: It includes everything. I have $20 for everything without the hotel.

Q We weren't in court yesterday. Did you discuss your testimony yesterday with Mr. Stearns?

A For about 20 minutes.

Q Where?

A Up in his office.

Q Did you discuss it with this young fellow?

A No, I don't see him yesterday.

Q Did you discuss it with anybody else in Mr. Stearns office?

A No, sir.

Q Did you look at or were you told about Mr. Bernardini's testimony?

A No, sir.

Q Were you curious?

A Excuse me.

Q Weren't you curious about Mr. Bernardini's testimony?

MR. STEARNS: He appears not to understand the word curious.

THE COURT: If the witness doesn't understand the

question, he will say so, I am sure.

A We were discussing Mr. Bernardini's testimony.

Q What members of the crew take care of the hatches, opening and closing them?

A The deck crew.

Q Is there a man in charge of them?

A I am in charge of them.

Q And you supervise them when they open up these pontoons?

A Together with the second and third officer.

Q Second and third?

A Yes, sir.

Q Were you at No. 4 when they were opening or was it the second and third officer?

A I cannot remember where I was during the opening of No. 4 hatch, but I know that I had been around and had a look down in the hatches and so on.

Q The machinery that opens up the pontoons, what is that lubricated with?

A The machinery is from the winches.

Q What kind of lubrication do you put on it?

A The machinery used grease which is called Molycote.

Q Grease Molycote?

A Yes.

Q Was that the brand name?

A A special kind of grease.

Q How is that applied, with a can or with a brush?

A With a gun.

Q Is it liquid or is it more like a jellyish?

A It is not liquid.

Q What is it?

A It is grease.

Q When machinery is moving, it sort of melts it down, doesn't it?

A It is going inside the engine.

Q What about the moving parts of the pontoons?

A The moving parts of the pontoons, the wheels on them is also greased with Molycote.

Q When they go back and forth and move, the movement sort of melts it down into a liquid, is that not true?

A No.

Q Does it stay as a paste?

A It stays as a paste the whole time.

Q Did Mr. Bernardini leave the ship by himself?

A Yes, sir.

Q Nobody went with him?

A I don't think so, sir.

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Q None of the other stevedores or longshoremen?

A No, not that I could see.

Q Were you watching?

A I was watching when he got up and was leaving, the area of No. 4 hatch.

Q You say these pallets were placed by the longshoremen, the stevedores, is that right?

A That is right.

Q And you say they were put there the day before?

A Yes, sir.

Q They weren't taken away the night before?

A No.

Q Did the ship's crew have anything to do about placing them?

A No.

Q But you saw them there the day before?

A Yes, sir.

Q And you saw them there that morning?

A Yes, sir.

Q Did you tell any of the stevedores or longshoremen to take them away the night before?

A No, sir.

Q Didyou tell them to take them away in the morning?

A No, sir.

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Q You left them there all day?

A Yes.

Q Were they being used for cargo?

A They are not being --

Q Yes or no.

A No, sir.

Q You say they were being used, were they, to have a walkway to look down into the hatch and over the side of the ship?

A That is right, sir.

MR. AUSLANDER: That is all.

CROSS EXAMINATION

BY MR. TESTA:

Q Captain Stahl, when Mr. Bernardini came aboard the vessel, did he ask you if you were a longshoreman?

A Yes, sir.

Q What did you say to him?

A He asked me if I was the hatch boss.

Q What was your answer to that?

A I said no.

Q Was anything else said other than that?

A Nothing.

Q Then he walked over to the offshore side?

A That is right, sir.

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Q The next thing you know he came around back again on the inshore side and that is when you say he kneeled down on these pallets?

A Right, sir.

Q At that time did he say to you thathe was claiming an unsafe passage? Were those the words he used?

A I cannot say exactly his words but he was claiming of an unsafe passage.

Q Did he say anything to you about slipping on oil and grease?

A No, sir.

Q Did he say anything to you about tiptoeing around patches of oil and grease?

A Nothing.

Q Did he say anything to you about hearing the boom making a cracking sound?

A Nothing.

Q Did you hear the boom make a cracking sound?

A No.

Q You just told Mr. Auslander that these pallets were put down by the stevedores to make a walkway between the hatch coaming and the railing, is that right?

A Yes.

Q That is so the signalman or gangwayman could walk

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back and forth?

A Yes.

Q I believe you told Mr. Stearns on direct examination that you had seen similar arrangements many times in the United States?

A All the times I have been in the United States, the stevedores used these pallets as walking boards.

Q You also told Mr. Stearns there was nothing unusual about that type of an arrangement.

A No, sir.

Q As chief mate of the vessel, if you thought there was something unusual about it, you would have had it removed, wouldn't you?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Mr. Auslander asked you that question, didn't he?

A Yes.

Q And you didn't think there was anything unusual about it, did you?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

MR. TESTA: May I know why, your Honor?

THE COURT: I have ruled. Ask your next question.

Q When Mr.Auslander was cross examining you,

the word play acting came up somehow or other and that was Mr. Auslander's phrase, wasn't it?

A Yes.

Q And also while Mr. Auslander was cross examining you, you said that the crew oils the wheels on the hatch cover during the voyage?

A Yes.

Q Is there some particular person in the crew that does that?

A The carpenter.

Q Is that his job or one of his jobs?

A It is one of his jobs.

Q And we believe you told Mr. Auslander they do this with a gun?

A They do it with a gun, yes.

Q Is that a spray gun of some type?

A It is a pressure gun.

Q How does that operate?

A It is operated by hand. You have grease in a hand and press it in a connection.

Q What happens when you do that?

A The grease is coming in the connection around the bearings on the wheels.

Q Is there a particular opening that the grease goes

into?

A There is a grease nipple.

Q I am trying to understand you, does the grease gun fit into an opening someplace?

A Yes.

Q So the carpenter is shooting the grease from some kind of a gun into an opening?

A Yes.

Q Onto the pontoon or wheels that operate the hatch covers?

A Yes.

Q How many openings are there?

A There is one on each wheel.

Q How many wheels are there?

A There would be two wheels on each hatch cover on each side.

Q How many is that all together?

A 16 inner wheels on the hatch No. 4 and there will be 4 offshore wheels.

Q If any grease was spilled during that process whose job on the ship would it be to wipe it up?

A The same man who is greasing.

Q The carpenter?

A Yes.

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Q In the course of that process shooting that gun of grease into these openings, if any spilled, it is his job to wipe it up?

A That is right.

Q You were chief mate, is that right?

A Right.

Q At the time this accident happened?

A Yes.

Q Were you in charge of the entire ship?

A I was not in charge of the entire ship. There is always the captain.

Q Was the captain aboard in the morning?

A Yes, sir.

Q Were you in charge of any part of the ship as chief mate?

A The loading operation and the crew, deck crews working operation.

Q I am afraid I didn't get it?

THE COURT: The loading operation and the deck crew's operation.

Q The deck crew operation, is that it?

A Yes.

Q Does that also include the deck?

MR. STEARNS: Objection. This is virtually

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a legal conclusion.

THE COURT: I will sustain an objection but I think you can inquire in this area.

Q You indicated in answer to questions by Mr. Auslander that you were responsible for the safety conditions, is that correct?

A That is correct.

Q Did that include the deck?

A Yes, sir.

Q Did that include any conditions on the deck?

A Yes.

Q You were on duty starting at about 7:30 in the morning?

A That is right, sir.

Q And you were checking all the hatches, the 1, 2, 3 and 4 hatches,were you not?

A Yes.

Q And the crew was opening these hatches?

A Yes, sir.

Q And you were walking around these hatches, were you not?

A I was walking around the hatch, yes.

Q If you saw any condition on deck, you would have done something about it, wouldn't you?

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A Right, sir.

Q If you saw any oil and grease on the deck, you would have done something about cleaning it up, wouldn't you?

MR. AUSLANDER: Objected to.

THE COURT: Overruled.

MR. AUSLANDER That is what we are here to find out.

THE COURT: Overruled.

A Yes, sir.

Q And you walked around each one of these hatches, didn't you, Captain?

A Right.

Q Did you see any oil and grease around those hatches on the deck?

A No, sir.

Q Specifically, did you see any oil and grease in the starboard after end of the No. 4 hatch when you walked around it?

A I didn't see any grease.

THE COURT: Did you see any oil?

THE WITNESS: No oil.

Q How many times did you walk around the No. 4 hatch?

A I can't say exactly. As the chief officer, you don't stay long any place. You are always going around.

Q Between 7:30 a.m. and 8:50 a.m., did you walk around the No. 4 hatch once or more than once?

A More than once. I would suggest three or four times.

Q Did you slip anywhere in the vicinity of the starboard after end of the No. 4 hatch?

MR. AUSLANDER: Objected to.

THE COURT: Overruled.

A No, sir.

Q Did you have to tippy-toe around in the starboard after end of the No. 4 hatch, Captain?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q You indicated in response to Mr. Auslander's questions that you didn't ask the longshoreman to remove that pallet walkway, is that right?

A That is right.

Q That is because you thought there was nothing wrong with it.

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Why was that, Captain?

A I cannot understand your question.

Q You indicated you did not ask the stevedores to remove that applet walkway. It was there the day before, isn't that right?

A That is right.

Q And you saw nothing unusual about that, didn't you?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Didn't you tell Mr. Auslander that if you saw any condition that was unusual you would have had it removed?

MR. AUSLANDER: Objection. I didn't ask him that specifically.

THE COURT: If you didn't, he will say you didn't. Did you make that testimony prior?

THE WITNESS: I think so, I am not sure.

Q In any event, you didn't ask anybody to remove, is that right?

A That is right.

Q And you saw nothing unusual in that arrangement?

MR. AUSLANDER: Objection .

THE COURT: Sustained.

Q How long have you been a chief mate?

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A I have been chief mate since 1958.

Q Before that, what did you do?

A I had been second mate and I have been an officer in the Navy.

Q This particular day you were wearing no uniform of any kind?

A No, sir.

Q When Mr. Bernardini knelt down on these pallets, did he claim any other thing other than he claimed an unsafe passage?

A He wanted to see somebody.

Q Did you call somebody?

A I was calling the pier superintendent and the foreman in charge of the loading of the vessel.

Q Did they come over there to where he was and where you were?

A I was going to No. 3 hatch to catch them.

Q After you got them at the No. 3 hatch, did you bring them back to the No. 4 hatch?

A Right.

Q Was Mr. Bernardini still there?

A Yes.

Q In your presence, did he say anything to them about slipping on oil and grease on the deck?

A No.

Q In your presence did he say he heard a cracking sound from the boom to either one of these gentlemen?

A No, sir.

Q Did he make any claims to them in your presence?

A Only about the unsafe passage.

Q Then he left the ship?

A The superintendent of the pier told him to go ashore and see the timekeeper.

Q Did you see him after that?

A No, sir.

Q Mr. Auslander asked you this question. He said if there was oil and grease on the vessel and you didn't do something about it and somebody got hurt, you would be held responsible?

A The company will hold the responsibility.

Q Your company?

A Yes.

Q The shipping company?

A That is right.

Q And that is the reason you are out there checking these conditions to see that there is nothing wrong?

MR. AUSLANDER: Object to the form.

THE COURT: Sustained.

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Q You indicated before you were responsible for safety conditions, didn't you?

A Yes, sir.

Q Did you check the area in the No. 4 hatch for safety conditions?

A Yes.

Q Was there anything safe or improper in that area?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q You said something about Mr. Bernardini laying down on three pallets, two on top of each other and one alongside?

A That is right.

Q Where were these two pallets?

A These two pallets were from the hatch coaming.

Q Close to the hatch coming?

A One close to the hatch coaming then the next one outside that one to the side. The third one was on top of the hatch coaming.

Q Was this apllet walkway one pallet high or two pallets high, that is what I am trying to find out?

A It was two pallets high close to the hatch coaming.

Q And away from the hatch coaming?

A One pallet high.

Q Was it one pallet high all the way over to the railing?

A Yes.

Q It was only two pallets high next to the hatch coaming?

A Yes.

Q How high was one of these pallets, Captain?

A About five to six inches, not more.

Q You indicated when you went over to Mr. Bernardini, you suspected it was his left side he was claiming about?

A That was my suspicion.

Q Why do you say that?

A Because he was holding his hand on his left shoulder, like this.

THE COURT: Indicating and placing his right hand across his body and holding his upper left shoulder.

Q While he was holding his right hand on his left shoulder, did he say that that shoulder hurt him?

A No.

Q Did he say that he hurt?

A No.

Q Did he make any complaints of pain?

A No.

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Q Did he make any complaints of pain at all?

A No.

Q Was he yelling or screaming that anything was bothering him?

A He was yelling and screaming.

Q Did he say he was doing that because it hurt or why he was doing that?

A I cannot say why he was doing that.

Q How long was he on the ship from the time this incident happened until he left the ship?

A About five minutes.

Q During the time you went on duty from 7:30 in the morning to 8:50 when this incident took place, was the second and third officer already on deck?

A Yes, one of the officers was in hatch No. 3 to prepare the hatch for loading.

The other officer was in hatch No. 1 to look for the loading there.

Q Were there any other crew members on deck at that time?

A Yes.

Q How many?

A I cannot say how many exactly. Some of the crew members had been working outside, some crew members were

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working down in the holds.

Q I am only talking about the deck, Captain, how many crew members were on deck when you went on deck at 7:30 to 8:50?

A Several crew members.

Q Were they working in various areas?

A Yes.

Q Can you tell me where they were working?

A Some of them were working on the outside, the ship side.

Q On the outside?

A The ship's outside for painting.

Q How many were on deck?

A Around 4.

Q How many were on deck in the vicinity of No. 4 hatch?

A Nobody.

Q How did they open up the No. 4 hatch?

A By use of a wire to the winches.

Q Would you describe the procedure of how the hatch covers are opened up, particularly the No. 4 hatch?

MR. STEARNS: Your Honor, I don't see the relevance of this.

THE COURT: Overruled.

Q How is it done?

A It is difficult to explain it.

Q Is it done manually or mechanically?

A It is done mechanically by using the ship's winches and a running wire.

Q Is it necessary for anybody to hook up the wire?

A Yes, sir.

Q Who does that?

A The Ship's crew.

Q Do they have to get down on the deck to do that?

A There is one wire sitting in the end of the hatch cover.

Q Which end?

A When you close the hatches or open the hatches, it is sitting in the forward end of the hatch covers in the center.

Q Do these hatch covers run from side to side across the ship or fore and aft?

A Fore and aft.

Q You have a wire sitting in the forward end of the forward hatch cover in the center. This wire is going to a block. When you open the catch, the wires go into the block in the after end and after that up to the running wire and when you close the hatches, the wire

is going to the block in the forward end andup to the running wire.

Q You use only one wire for this?

A Yes.

Q And there is only one connection?

A One connection.

Q With that one wire connected, to one particular spot, it opens up the hatch covers?

A Yes.

Q And that is by means of somebody operating the winch?

A One of the crew operates the winch when we open and close the hatch.

Q And one of the crew members hook up the wire?

A Yes.

Q Can you show us on that diagram where that wire is hooked up?

A Yes, sir.

When you open the hatches, you have four hatch covers going over like this.

The forward hatch cover has a connection over here.

MR. STEARNS: Indicating about the middle of the forward coaming.

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A On the middle of the hatch cover, one wire is taken from there to the after end.

Q How is it taken from the forward end to the after end, does somebody walk with it?

A When the hatch is closed, one of the crew members --

Q When it is closed and you want to open it?

A One of the crew members walk over here.

Q Over the top of the hatch covers?

A Yes.

Q And puts it over the wheel here and takes it back and hooks it to the running wire. After that you run the running wire and this wire is going to stretch and take all these hatch covers to the recess over here.

Q The one wire when it is hooked up it opens up all the hatch covers?

A Yes.

Q When you are closing the hatches, youdo it in a different way. At that time the hatches are in a recess over here. You take the wire to a block here, around this block and up and connected with the running wire.

Q When the hatch is opened and you say the hatch covers go into a recess, where is that recess that the hatch covers go into?

A That would be a space here and they are placed in

an upside down position.

Q Does it fill up the entire space, the hatch covers?

A Yes.

Q Right up against the housing behind it?

A Yes.

THE COURT: Indicating the after end of the hatch?

THE WITNESS: Yes.

Q That space is completely filled up with the hatch covers?

A It cannot be completely filled. There is a space about this hatch.

The hatch covers have to fall down before you could see it from the side.

You have four hatch covers like this on wheels. When you hook it on the wire, this is going to fall down, this one and the rest will follow.

There is a small psace.

THE COURT: That small space you indicated with your hands would appear to be 18 inches?

THE WITNESS: Yes.

REDIRECT EXAMINATION

BY MR. STEARNS:

Q Captain, the small space you referred to, is that

small space shown in these photographs, particularly in Defendant's Exhibit D-5?

A Yes, you can see the small space over here.

Q Would you indicate, and perhaps if you could do it by pen.

A It is between here and this area.

MR. STEARNS: Again the pen is not writing. May I ask Captain Stahl to go over and show it to the jury?

THE COURT: Why don't we try another pen.

Q You have inked in a small space on the left.

A Yes.

Q Is this space between these two fences that you described and explained to us when referring to Exhibit D-4, the photograph?

A Yes.

Q Is that space within this area fenced off on the port and starboard side?

A Yes, sir.

Q When the ship is at sea and the hatch covers are over the hatch, that is, the hatch is closed and in warm weather, is this fenced off space used for anything?

A Yes, it is used as a swimming pool.

Q It is filled with water?

A Yes.

Q That is the space between the after edge of the coaming and the forward end of the poopdeck structure, is that right?

A Yes.

Q The forward end of the poppdeck structure is shown in Defendant's Exhibit D-4, is it not?

THE COURT: Captain, during the five minutes or so Mr. Bernardini was on board, was the No. 4 hatch fully opened at all times?

THE WITNESS: It was fully opened at all times.

Q Captain, is it possible to walk around the aft coaming of the No. 4 hatch on the Svensksund within a foot of the aft coaming?

MR. AUSLANDER: This is just repetitive. I don't think it is proper redirect and I make my objection on that ground and that ground alone.

THE COURT: My recollection is he said it was not possible.

MR. AUSLANDER: I recall him saying the same thing.

THE COURT: Your point is well taken.

I think it is repetitious.

Q Is it possible to walk around the stern, the fantail of this ship?

A It is possible to walk around this way.

Q To do that would you indicate with this blue pencil what route would have to be taken to get around?

A If a man is saying on the port side, on the off side here, he had to go around thisway.

Q And you have done that in blue?

A Yes. That is the only way around.

MR. STEARNS: I would like to show this line to the jury.

THE COURT: You may.

Q There is only one hatch ladder at the No. 4 hatch?

A There is one hatch ladder.

Q And that is the hatch ladder that you pointed out here at the X in a square on this diagram?

A Yes.

Q Mr. Bernardini went past that when he went over to the offshore side?

A Yes.

Q Was it open?

A It was open.

Q Was it open as shown in this picture which is Defendant's Exhibit D-1?

A Yes.

Q And this Defendant's Exhibit D-1 shows the path

Mr. Bernardini took when he walked from the inshore to the offshore side?

A Yes, he was coming from the inside walking to outside.

Q Captain, I show you this logbook and ask you whether or not you can identify it.

A Yes.

Q What is it?

A It is the ship's day book for the vessel Svensksund.

Q For what period of time?

A For the 3rd or 2nd of October 1969 to May 1970.

MR. STEARNS: I offer it in evidence.

MR. AUSLANDER: Objection. What for?

THE COURT: The first thing we will do is mark it for identification.

(Defendant's Exhibit F was marked for identification.)

Q Captain, is that book a record made and kept in the ordinary course of the business of the ship?

A Yes.

MR. STEARNS: I offer it in evidence.

MR.AUSLANDER: Is it in English?

THE COURT: Show it to the other side.

Is it the log or the day book?

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THE WITNESS: It is the log for the deck.

THE COURT: Is it the rough log?

THE WITNESS: It is the true log.

MR. AUSLANDER: I don't know what it is, your Honor, it is not in English.

THE COURT: If the jury can't understand it, that is one of those things at this point.

Do you have any other objection?

MR. AUSLANDER: No.

THE COURT: It will be received.

(Defendant's Exhibit F for identification was received in evidence.)

Q Captain, you testified, have you not, there is no entry in the log, Defendant's Exhibit F relating to this incident involving Mr. Bernardini?

A That is right.

Q Can you identify this document which will be marked as Defendant's Exhibit G?

A It is the abstract written out by me of the events of 28 October 1969.

(Defendant's Exhibit G was marked for identifidation.)

Q You referred to this as an abstract.

Would you look down at the bottom of this abstract

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without translating it what printing is contained at the bottom of the abstract?

MR. AUSLANDER: I will object to this, your Honor. This document isn't in evidence yet. We don't know whether it can get into evidence.

MR. STEARNS: This is for the purpose of identifying it.

THE COURT: I don't want him reading from it yet.

MR. STEARNS: I asked him to refer to it and tell us what the indication or the instructions are on the basis of the form.

THE COURT: But don't read from it.

Would you like to see it?

MR. AUSLANDER: Yes.

MR. STEARNS: Again, this is in Swedish.

MR.AUSLANDER: I don't know what the witness is going to say and ratherthan prejudice anything, if he wants to make an offer of proof outside the presence of the jury, we will know what is going on.

THE COURT: I think that is a reasonable request. We will step to the side bar or rather, I think, the jury might take their morning recess and we would resume at the outside of ten minutes.

Please do not discuss the case in the jury room and continue to keep an open mind.

(Jury leaves courtroom.)

THE COURT: Let the record reflect that the jurors have left the courtroom.

You may make your offer of proof.

MR. STEARNS: Your Honor, I am going to offer this. This is, the captain will testify, an abstract that was prepared pursuant to instructions given to the ship's officers and contains in addition on the base of the very form --

MR. AUSLANDER: On the basis of what?

MR. STEARNS: On the base of the very form of the abstract, the ship's officers are required to report directly to owners any unusual event such as this and to do it on this form. This form contains the officer's signature, the master.

As I understand it, this is done to immediately notify the owners of such an occurrence and then what is contained here is transcribed into the logbook.

In this case, as the captain has indicated, this was not done and the reason it was not done, is that he simply forgot to do it but this was made the day after, it was made by him pursuant to company instructions,

it is a record made in the regular course of business by him and forwarded to the owners and accounts for, I feel, the absence of a logbook entry and for that purpose it is being offered. That was because of an issue raised by Mr. Auslander.

THE COURT: Yes, he did raise the issue of whether there was an entry in the log.

MR. AUSLANDER: I can raise the question of whether there is an entry made in the log and I could make a point of it by asking if there was an entry made in the log but unless there is an official entry in the log, the fact what may or may not have been done, this is not a record kept in the regular course of shipping business.

MR. STEARNS: It certainly is.

MR. AUSLANDER: Let me finish, Mr. Stearns.

A log book is a record kept in the regular course of shipping business. A report, an abstract to shipowners is not a record kept in the regular course of shipping business just as many accident reports madeup by companies for various rules and regulations are not records kept in the regular course of business.

For the captain to try and explain away something, to try to get something now into evidence which is not

part of an official log is highly improper, prejudicial and I object to it most strenuously.

THE COURT: Mr. Stearns?

MR. STEARNS: Your Honor, it is a record kept pursuant to instructions of the company pursuant to company policy. It is a record made and kept pursuant to directives of the company. It is his business to make such a report, he did so.

THE COURT: Since the jury is not here, why don't you put several questions to the witness out of the presence of the jury to establish the point you just made in argument.

BY MR. STERANS:

Q Captain, give us an indication, not by reading word by word, what the instructions are at the base of that report.

A It is accident on the ship, engine or cargo, accident to any person, sickness. The ship's officer or the ship should directly send to the company a report on this form, to headquarters.

Q Is thisdocument marked as Exhibit G for identification such a report that you made pursuant to those instructions to the owners of the Svensksund?

A Yes, sir.

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THE COURT: The events in question occurred as I recall on October 28, 1969. Can you tell us when you made this record?

A I typed it out the 29th. I was doing first a draft then after that I was typing this abstract out and I was going to write it down in the log but I forget it.

THE COURT: I will receive the document.

MR. AUSLANDER: I except, your Honor.

May I just ask your Honor,please, under what section that you are receivingthis?

THE COURT: As far as I am concerned, this is a record made and kept inthe regular course of business as I have heard it. I consider it to be a memorandum, report, record, data, compilation of events which was made at or near the time of their occurrence by a person with knowledge of the facts in the course of a regularly conducted business activity and if you have your exception, it seems to me your record is made.

MR. AUSLANDER: Your Honor, are you not required to know what the regular course of business activity is before you could say that this is a record kept in that course?

THE COURT: I don't plan to answer any of your questions, Mr. Auslander. I understand that you have your

exception.

MR. AUSLANDER: I didn't mean to put you on the witness stand.

THE COURT: I would think not, sir.

MR. AUSLANDER: I further object to it, your Honor, on the grounds that we should have at least a certified true translation and not have the captain just translate it, but that isn't my only ground, but on a further ground now after you have already let it in, I am objecting that we don't have a certified true translation of the document.

THE COURT: You happen to nave the writer nad he is here under oath. I don't think you could do very much better.

If you want to ask him any question, proceed now.

If you want a ribbon around it, that is your prerogative but you have the writer of the document on the stand under oath. If you want to ask him any questions about what that document states, you may ask it at that time.

MR. AUSLANDER: I except.

THE COURT: You decline to do so?

MR. AUSLANDER: I see no purpose.

THE COURT: You have been afforded the opportunity,

we will leave the matter at that.

There will be a five-minute recess.

(Recess.)

(In the robing room.)

MR. AUSLANDER: Sir, in your last ruling, I did not mean to give the impression that I was impugning the Court's legal background. All I was attempting to do as my understanding of the law was, when you make an objection to a specific legal ruling that you afford the Court your reasons so that in the event there was something that the Court might have missed, tney have an opportunity to act on it or pass upon it and for that and that reason alone did I make the comment, is it not true that before this document can come in as a piece in the regular course of business we have to ascertain whether the regular course of business was making accident reports or whether the regular course of business are shipping logbook entries.

THE COURT: I don't see this document as an "accident report" solely and exclusively. It is a report of an occurrence on a vessel and in the normal course as I understand it, that would be an original entry which would then be recopied into the log and inasmuch as the log would clearly be admissible I believe and he has

testified that this original entry would be copied into the log but he inadvertently did not copy it into the log, I believe that this document which is an original document made at or near the time of the occurrence by a person having knowledge of the facts which in the normal course of events would have been placed into the log, is in and of itself admissible just as though it were an abstract from the log itself.

If you want to cross examine him on this, I think you have every right to do so and I do not intend to cut you off in that respect, but I think I have given you at some greater length the rationale of my ruling and you have made your objection and you have your exception.

MR. AUSLANDER: That was the only reason I brought it up in that manner, was to give you my legal reasons so the Court may be afforded an opportunity to reverse itself if in fact it felt as I did, that is all.

THE COURT: All right, gentlemen.

MR. AUSLANDER I would like a voir dire of the captain in front of the jury.

THE COURT: You may have it.

(In open court; jury present.)

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THE COURT: Mr. Auslander, you requested a voir dire and you may proceed.

VOIR DIRE EXAMINATION

BY MR. AUSLANDER:

Q Captain, this Defendant's Exhibit G for identification and this writing in English, do you say that that is an exact translation of what you have on there?

A Yes, sir.

MR. AUSLANDER: I still renew my objection, your Honor. Let me see the document.

MR. AUSLANDER: I will waive my objection.

THE COURT: In other words, you withdraw it.

MR. STEARNS: You are withdrawing your objection to the admissibility of the document?

MR.AUSLANDER: And the translation.

THE COURT: It is received.

(Defendant's Exhibit G was received in evidence.)

BY MR. STEARNS:

Q Captain, will you identify what this document is, Defendant's Exhibit G in evidence?

A It is an abstract that will be from the deck's log but apparently that is a draft that I later on would enter into the logbook but forget it.

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MR. AUSLANDER: May I have that answer read back.

(Answer read.)

Q Captain Stahl, you indicated out of the jury's hearing, did you not, first you would prepare a draft --

MR.AUSLANDER: I will object to the form.

THE COURT: I don't want you to leave even though some things may have occurred outside the hearing of the jurors.

Q Tell us first whether or not you prepared a draft of this entry which appears in Defendant's Exhibit G.

A I first prepared a draft. I prepared an abstract and after that I should have entered it in the logbook.

Q And you did not copy that entry which appears in Exhibit G in the log, is that what your testimony is?

A Yes.

Q And was that due to inadvertence?

MR. AUSLANDER: Objection.

THE COURT: Sustained as to form.

Q Can you give us the reason why not?

A The vessel was staying at that time in Norfolk and I was very busy and there is a Swedish regulation saying that I must make an entry not less than 24 hours after something happened or the day after. I was thinking

I still had time to do it but I forget it.

Q The vessel left the Port of New York on what day?

A The 28th.

Q Was it in Norfolk on the 29th?

A Yes.

Q That was prepared on the 29th?

A That was prepared on the 29th.

Q This was your report of this event to the owners, is that correct?

A Yes, that is correct.

Q Captain, refer to this report to the owners and refresh your recollection as to what you told them about this event.

A I don't understand your question.

Q Refer to it, use it to refresh your recollection as to what you reported to the owners of the Svensksund about this event claimed by Mr. Bernardini.

MR. AUSLANDER: Objection.

THE COURT: I would think it is in evidence as a matter of fact. It can be read to the jury and he hasn't indicated he needs his recollection refreshed, so under the circumstances, I think you have several options but not this one.

Q You testified about greasing the wheels of the

hatch covers of the No. 4 hatch, Captain, have you not?

A Yes.

Q Was there a custom and practice aboard the Svensksund relating to when this greasing of these wheels would be done?

A The greasing had been done always on voyage, the long voyage between South America and North America.

Q Are you talking about while the ship is at sea?

A When the ship is at sea, yes.

Q I believe you testified that you were on the Svensksund for about three and a half to four years, is that correct?

A Both together, yes.

Q Based on your experience aboard the ship with these very hatch covers, how often did they require greasing?

MR. AUSLANDER: I will object to that.

THE COURT: Overruled.

A I will say once or twice a year with this special grease we have.

Q You testified, did you not, there would be approximately 8 members of the crew on deck during the time the ship was, worked by the stevedores, is that not so?

A That is right.

Q Of course the stevedore would have many people working on the ship, many of them on the deck, is that not so?

A If in deck had to be counted the holes, that would be true.

Q There were men working at the various hatches on the Svensksund on October 28, 1969 who were employed by ITO?

A Yes, I suppose.

Q You referred to the pier superintendent, was he an ITO employee?

A I can't say that.

Q How about the ship foreman, I think you called it the stevedore foreman.

A The stevedore foreman.

Q You looked around the ship to see there were no unsafe conditions, did you not?

A I do.

Q Did anybody else employed by ITO do the same thing?

A Yes.

Q In fact, they had a safetyman to do that?

MR. AUSLANDER: Objection.

MR. TESTA: I object also.

THE COURT: Sustained.

MR. STEARNS: As to form.

Q Can you tell me whether or not on October 28, 1969 ITO had a safetyman?

MR. AUSLANDER: Objection.

MR. TESTA: Objection.

THE COURT: Sustained. It is not only to form.

Q Can you tell me whether on October 28, 1968 ITO employed a man whose sole function was to check the ship for safety?

MR. TESTA: Objection, if your Honor please.

THE COURT: State your grounds.

MR. TESTA: He said October 28, 1968, which is not the date of the accident.

Second of all, it has no bearings to the issues in this case as between the plaintiff and the defendant.

MR. STEARNS: I agree with that.

THE COURT: The objection is overruled.

Q Did they?

A Did the stevedores have a safetyman that is coming on board the same time as the stevedores?

Q On October 28, 1969, what time was that?

A 8 o'clock in the morning.

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Q How many gangs were aboard at 8 o'clock in the morning on that day?

A Three gangs.

Q Can you tell us what areas of the ship they worked?

A Hatch No. 1, hatch No. 3 and hatch No. 4, also working in hatch No. 2, but one gang was shifting from hatch No. 3 to hatch No. 2.

THE COURT: How many men make up a gang?

THE WINTESS: With the deck boss and the winchman, I would say 22 men on board a vessel and also a shore gang to take care of the cargo going ashore or from the ship to shore.

THE COURT: Incidentally, on the day in question, was the ship loading or unloading?

THE WITNESS: The ship was loading.

Q You were in charge, were you not of the ship's crew?

A Yes.

Q Were there employees of ITO who were in charge of the stevedores?

A I don't understand your question.

Q Were there employees of ITO who were in charge of the longshoremen working aboard the ship that day?

A Yes.

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Q You were not in charge of the longshoremen, were you?

A No, sir.

Q Referring to the photographs, particularly Defendant's Exhibit D-1, I ask you now whether the coaming at hatch No. 4 had a lip or a flange to it.

A Yes.

Q Where is that? Did this lip or flange to the coaming go all the way around the coaming?

A Yes.

MR. STEARNS: May I show this to the jury?

THE COURT: You may.

(Pause.)

Q Captain, I would ask you to look at the front of the jury box and to observe the fact that the top of the jury box overhangs the supporting wall of the jury box.

A That is right.

Q That kind of situation with an overhanging top of the coaming exist aboard the No. 4 hatch on the Svensksund?

A All the hatches.

Q What was the approximate depth from the wall out to the coaming?

A About 4 inches.

Q based on your experience aboard the ship, was there a custom and practice in effect in October of 1969 regarding the washing down of the deck areas of the vessel?

A It is practiced, yes.

Q Where was this washing down done?

A For sure it was done the last Saturday.

Q Would you refer to the log, please, and tell us if you can why for sure it would have been done on the Saturday last?

A It is a custom on every vessel, Saturday is used as a cleaning day when the whole ship is cleaned, the crew's accommodation and so on.

Saturday the 23rd of October the vessel was on voyage between Baltimore and New York and arrived at New York 1500. That day was used for cleaning the deck, cleaning the crew's accommodation, cleaning the whole ship, inside.

MR.AUSLANDER: Is the captain reading that?

THE WITNESS: No. That is done by experience.

Q That is based on what the custom and practice was aboard the ship at that time?

A It is not only this ship, all Scandinavian vessels use Saturday for hard cleaning.

Q When you approached Mr. Bernardini as he was lying on the pallets after he had laid himself down on the pallets, who position was he in?

A He was in a down position resting on his left arm and his right arm over his left shoulder.

MR.AUSLANDER: May I hear the last part of that?

(Read.)

Q Was his face down?

A I cannot say down. It was to the side.

Q Was there anybody else at that time or at that time when Mr. Bernardini says he had his accident on the inshore side of the No. 4 hatch?

A I was alone there with Mr. Bernardini.

MR. STEARNS: No questions.

RECROSS EXAMINATION

BY MR. AUSLANDER:

Q Captain, when did you become a captain?

A I got my captain's license 1961.

Q But you were only acting as first office that date?

A Before that date I was acting as chief officer on ocean going vessels.

Q Had you acted as captain between the time you got your license and 1969?

A Yes, sir.

Q On ocean going vessels?

A Yes, sir.

Q When was the last time?

A The last time was 1968.

Q The same company?

A Same company, the same vessel.

Q Were you ever acting as captain after that for the same company?

A No, sir.

Q I think you said in response to Mr. Stearns question that these wheels on the hatch covers are greased once or twice a year?

A That is right, sir.

Q What is that grease supposed to do for the wheels?

A Staying between the bearings and the piston to keep the wheels running smoothly.

Q Isn't it also supposed to be some type of a preservative?

A What do you mean preservative?

Q To keep the gears from getting rusty?

A No, sir. The bearings is made of metal.

Q These wheels here on Defendant's Exhibit 5?

A These wheels have a bearing of metal.

Q Metal rusts, doesn't it?

A No.

MR. STEARNS: It depends what kind of metal. Aluminum doesn't rust.

Q Are these aluminum?

A No. They are metal.

Q Steel?

A No.

Q Iron? What?

A Brass.

Q What about this portion and this portion?

A You mean this here?

Q These, what do you call these I am pointing?

A Chains.

Q What are they called?

A In Swedish it's called shackle.

Q What is it called in English?

A It's small shackles too.

MR. TESTA: I don't understand that last word.

THE COURT: Shackles.

Q What is it used for?

A Can I use the table to explain?

Q Is this a wheel?

A The big one is a wheel.

Q This one I am pointing to here, is that the same kind of wheel you circled up here?

A Not the same type.

Q What kind of wheel is this?

A This is the same of a block. An entry.

Q Is that brass?

A I didn't say the wheels were brass, the bearings with wheels.

MR. STEARNS: Can we have what he is indicating?

THE COURT: There is a record being kept of this. You are asking him what are these.

Q These objects that the chains are attached to which I will have you circle in just a moment, what are these? Wheels?

A Wheels.

Q Are they brass?

A The wheels is not brass.

Q What are they?

A Steel.

Q And steel rusts, does it not?

A Yes.

Q And steel rusts -- I am sorry, would you circle what we were just talking about. In fact put a box around

it because you put a circle around those on top.

A Which?

Q The ones we were talking about.

You put a box around that as opposed to the circles on top?

A That is right.

MR. AUSLANDER: May I, your Honor?

THE COURT: Yes.

(Pause.)

Q Those steel wheels rust?

A Yes.

Q How many times does this ship go up and back on the ocean in a year?

A This ship was making around 5 voyages between South America and North American each year.

Q That is pretty much a whole year?

A It is a whole year.

Q And at sea how many months would you estimate out of the twelve?

A A voyage from the last port in the States to the first port in South America takes 12 days. After that it was running out and in a port every day.

Q Actually would you say that this boat is in the water, in the ocean at least ten months out of the year?

A I will say in the water 12 months a year.

Q You answered, I believe in answer to Mr. Testa's question and also to Mr. Stearns but I may be wrong about that, that when you came over to the man, he didn't make any complaints about pain at all, is that true?

A That is true.

Q He made no complaints about pain.

Q I think you also said and I copied this down and I may be wrong, Mr. Stearns said to you when you approached Mr. Bernardini after he laid himself down on the pallets, did he say anything to you?

Do you remember him ask you that?

A He was complaining about the unsafe passage.

Q Do you remember him saying to you after he laid himself down on the pallets?

A Yes.

Q You told us that Defendant's Exhibit G is a true copy, a true translation of what you wrote in your abstract, is that true?

A Yes.

MR. AUSLANDER: May I read this?

THE COURT: Yes.

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(Defendant's Exhibit G in evidence was read to the jury.)

Q When you say bulwark, you mean the rail?

A Yes.

Q Do you know the difference between laying down and falling?

MR. STEARNS: Object to the tone of voice. There is no reason for that kind of accosting of this witness.

THE COURT: There is no reason for either counsel to be exercised.

There is a question put to you, do you know the difference between falling down and laying down, is that it?

Q Laying down and falling down?

A I know they are different.

Q You know they are different?

A Yes.

Q Do you know the difference between no complaints of pain and complaints of pain?

A Yes.

Q Did Mr. Bernardini tell you his name?

A No.

Q Who told you his name?

A The owner's representative.

Q The owner's representative?

A Yes.

Q The ship representative?

A No, the owner's representative.

Q The owner of the ship?

A Yes.

Q When did he tell you his name?

A About one and a half hour later.

Q You say you first made a draft of this abstract?

A Yes, sir.

Q How did you make it?

A I made the draft on a scrap of paper.

Q On what?

A On scratch paper.

Q What did you do with the scratch paper?

A You write it down on the scratch paper what you want to say, scratch it out and redo it.

Q You write on the scratch paper what you want to say then scratch out what you don't want to say?

A If I make a mistake in the draft I scratch it out and redo it so it is going to be true.

Q Did anybody look at that draft before you made up the typed copy?

A No.

Q No one at all?

A No.

Q Did you talk to the ship's representative?

A Yes.

Q Did you talk to him about making up the draft?

A He told me --

Q Did you talk to him about making up the draft?

A Not the draft.

Q Did you talk to him about making up this copy?

A He was telling me --

Q Just answer, did you talk to him?

A Yes.

Q I am not askingyou what he said. That is not permissible.

THE COURT: Please, no comment.

Q Did you ever rig a boom?

A I don't understand your question.

Q Did you ever raise or lower a boom?

A Yes, several times.

Q Do the wires, when you are pulling on them make any noise?

A Yes.

Q They are pulled tight, aren't they?

A When the boom is rigged, it will be tight. Not

during rigging.

Q Doesn't it have to be tight so it doesn't shake or move when it is picking up tons of cargo?

A I said after the rigging is to be tight;not during the rigging.

Q During the re-rigging?

A During the re-rigging, nothing is tight.

Q Is it made tight while you are re-rigging it?

A When the re-rigging is finished, you make it tight again.

Q And you pull on the wire to make it tight, isn't that true?

A I pull a rope.

Q Rope, wire, it is the same thing?

A No, it is not the same thing.

Q It is attached to the boom?

A It is attached to the boom.

Q And it is hanging?

A Yes.

Q And you are pulling it to make it tight?

A Yes.

Q And that makes a noise, doesn't it?

A It depends after if you have grease in the blocks or not.

Q Are you telling me that is a silent operation?

A No.

Q In fact, if you are walking on deck, you can hear that is going on, can't you?

A Yes, you can.

Q And as a matter of fact if you are walking on deck and you hear that going on, it is good practice to look up and see what is going on so you are not going to get hurt by the rigging, isn't that true?

A If you are going on the place where the rigging gang is operated.

Q You want to make sure it is not going to swing and come and hit you, isn't that true?

A There is nothing swinging during rigging.

Q Lines?

A No.

Q Nothing swings?

A No.

Q You never heard of a boom falling when it is being rigged?

A Yes, I heard about that.

Q And you never heard of a boom swinging when it is rigged?

A I heard about that too.

Q And if it swung or if it fell it could kill

somebody, couldn't it?

A It could, yes.

Q And you remember now as you were talking to us that he was complaining about pain in his left shoulder?

A I said in my statement later I heard him complaining of it I think I said later.

Q You said afterwards he made complaints?

A Yes.

Q What does that mean, an hour later?

A One hour later I heard it from the owner's representative.

Q Two hours later?

A One and a half hours later from the owners representative.

Q But he was holding his left shoulder while he was lying down?

A Yes.

Q And he was lyingdown like this?

A No, sir.

Q Didn't you say his right arm across his shoulder?

A Yes.

Q Lying down like this?

A No, a little bit more on the side.

MR. AUSLANDER That is all.

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THE COURT: You may step down, Captain Stahl.

(Witness excused.)

MR. STEARNS: At this time the defendant would offer in evidence the earnings records of this plaintiff maintained by the New York Shipping Association which was produced pursuant to subpoena by the New York Shipping Association.

THE COURT: First mark it for identification then show it to Mr. Auslander if he hasn't seen it already.

(Defendant's Exhibit H was marked for identification.)

MR. AUSLANDER: If your Honor please, this is highly improper and improper of Mr. Stearns. He knows it is improper.

MR. STEARNS: I don't know why in the world --

THE COURT: You want him to call someone from the New York Shipping Association, say so and I will insist that he do so. You have your rights. I will protect them at all times.

MR. AUSLANDER: May I look at these.

THE COURT: Of course. I would have thought he showed them to you already.

MR. AUSLANDER: No, he didn't.

THE COURT: Well, he should have, it would have

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made everything much easier.

(Pause.)

MR. AUSLANDER: No objection.

(Defendant's Exhibit H was received in evidence.)

MR. STEARNS: At this time the defendant will rest on the question of liability.

THE COURT: You must advise me relative to all facets of the case because the entire case is being tried.

MR. STEARNS: Your Honor, could I have a moment?

THE COURT: Of course.

(Pause.)

MR. STEARNS: We have decided with the Court's indulgence to call the doctor as we indicated, Dr. Lodico.

The defendant is not resting --

THE COURT: You are resting except for calling Dr. Lodico who is out of the city and will not be available until the first thing Tuesday morning.

MR. STEARNS: That is correct.

THE COURT: Mr. Testa?

MR. TESTA: I don't understand, your Honor, what did you want me to do at this point?

MR. TESTA: I think we have motions at this stage.

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THE COURT: If you want to make those, you may do so.

(At the side bar.)

MR. STEARNS: At this time the defendant moves for a directed verdict in its favor dismissing plaintiff's complaint as it states alleged causes of action is against the shipowner for unseaworthiness and negligence at the same time.

The defendant moves for a directed verdict against the third-party defendant on the issues raised by the third-party complaint.

MR. TESTA: At this time, your Honor, I join in the motion made by Mr. Stearns for a directed verdict on behalf of the defendant.

As far as the negligent count is concerned, it should be dismissed because there is no proof of notice of any defective condition to the shipowner.

As far as the unseaworthy count is concerned, there is absolutely no testimony or complete failure of proof there was anything defective, unsafe or improper about this pallet walkway condition and or those reasons, both causes of action should be dismissed and there should be a directed verdict on behalf of the defendant.

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MR. STEARNS: The complaint also should be dismissed on the grounds there is no credible evidence from plaintiff regarding the happening of this accident. There mere description of the accident is physically impossible. He has contradicted himself and misstated the situation that he claims happened that day at numerous points throughout his testimony, the least of which is that he said he made an immediate turn around the aft coaming and was close to the rail when it happened. Considering the fact there is a flange on this coaming and that he struck, allegedly and injured his right shoulder is patently absurd.

THE COURT: Mr. Auslander?

MR. AUSLANDER: There are questions of fact. There certainly is sufficient evidence. The mate said the walking boards were there the day before, they were there the night before, they were there that morning. The fact he said there was no grease there is a question of fact.

The fact there were heel marks all over the place would indicate that someone else stepped in it.

The fact that he says these things were only greased twice a year is a qustion of fact for the jury. I think as a matter of common knowledge, these steel things would rust, but these are questions to be argued in sum-

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mations, but there is certainly enough there for a jury if it so chooses to decide the vessel is not only negligent, unseaworthy, but besides which, on the basis of the regulations referred to and on the requests which I referred various cases in point, certainly we would be entitled to a charge on both aspects and would object to a dismissal at this point on either cause of action.

THE COURT: The motion is denied without prejudice to their being renewed at the close of all the evidence.

I think there are considerable doubts here relative to liability. However, I do feel it would be within the jury's province to believe the plaintiff and I do not believe it is the court's province at this point to reject his testimony as a matter of law.

As I said to the jury, questions of fact are for the jury although I believe the plaintiff's case is a fragile one at best, I am going to deny the motions subject without prejudice to their being renewed at the close of all the evidence.

MR. TESTA: If your Honor please, there is one other motion I would make.

At this time at the end of the third-party defendant and defendants' case, I would move to dismiss

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the defendants' case against the third party. There is no proof that the stevedore didn't perform its services in a workmanlike manner. There is a complete failure of proof that there is anything unworkmanlike or unsafe or dangerous about this pallet walkway. There is no proof in this record that the stevedore had notice of any oil or grease on the deck and lacking proof of any notice, there is no proof that they had an opportunity to do anything about it. In fact, the proof is as to the contrary. The chief testified there was oil and grease on the deck. He went around there three or four times. I say there is a complete failure of proof with respect to notice to the stevedore of any oily or slippery condition. There is a complete failure of proof that the stevedore did not perform the stevedoring services in a workmanlike manner.

There is no proof in this record at all that the pallet walkway was unsafe, defective in any manner or form.

THE COURT: I think that there is a question for the jury as to whether the pallets placed as they were in on the deck presented what might be classified as a stumbling hazard and if they did, it would seem to me that your client could be chargedwith liability here, and

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I am referring to the safety and health regulations for longshoring Section 1404.91 entitled "Housekeeping" and in addition to that, I don't feel that I can just eliminate from the case the plaintiff's sworn testimony that there was oil and grease on the deck and that he slipped on them and as you well realize from those regulations, there is a provision that slippery conditions are required to be eliminated as they occur.

At this point, I feel there is sufficient in the record, although as you indicated, I feel the plaintiff's case at best is fragile to require me at this time to deny the motion as is without prejudice to its renewal at the end of your case.

MR. TESTA: Regardless whatever these regulations say, there must be some notice to the stevedore. You can't eliminate a condition unless you know about it and there is nothing in this case.

There is no proof the mere fact that a condition is there does not make it defective in and of itself. There must be independent testimony.

There must be some proof. The mere happening of an accident or the mere existence without some proof that that condition is defective is not enough. There is a plethora of cases on this. The mere happening of an acci-

dent does not constitute negligence.

THE COURT: Of course I recollect that but you have proof in the record that you are ignoring from the mouth of the plaintiff under oath that there was oil and grease on the deck and that he slipped on that oil and grease. Motion denied.

MR. STEARNS: And that he saw it before.

MR. TESTA: Notice is missing.

(In open court.)

THE COURT: You may proceed, Mr. Testa.

MR. TESTA: I have a witness in the witness room.

THE COURT: All right.

Ladies and gentlemen, we are going to work until 1:15 and I would ask the jury to return at 2:30 and I would hope you will not be working late today. That is my anticipation.

May I suggest to you that the Court will not be held on Monday because of the observance of Veterans Day and I hope to conclude this case on Tuesday.

If you will bear with me for just a few minutes more, we will terminate at 1:15 and I will ask you to return here at 2:30. I will try to dispose of this SEC matter which is on for 2:15 so we could then continue until we have concluded the testimony of the witnesses who are

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here today.

You heard from Mr. Stearns that his Dr. Lodico is out of town and I have indicated since he will not be backtoday that we will hear his testimony the first thing Tuesday morning.

AFTERNOON SESSION 2:45 p.m.

(In open court; jury present.)

THE COURT: Mr. Testa, you may proceed.

MR. TESTA: Captain Wheeler.

W I L L I A M W H E E L E R, called as a witness on behalf of third-party defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TESTA:

Q What is your occupation?

A I am presently employed as a marine surveyor and a marine consultant.

Q How long have you been employed in that capacity?

A Self-employed since 1960. I was in partnership with another person from 1955 to 1960. Actually I have been in the marine surveying activities from 1955.

Q What did you do before that?

A Before that I went to sea as a master of American Flag vessels. I also worked as a stevedoring superintendent here in the Port of New York.

Before that I went to sea again as a deck officer, a master of American Flag vessels.

I was graduated from the Maritime Commission Cadet Training Program, now known as Kings Point in 1941 with a third officer's license.

Before that I served as a cadet on American Flag vessels and before that an ordinary seaman, a deck hand aboard vessels and prior to that time I was in high school.

Q Were you here when Mr. Bernardini testified and Captain Stahl testified with respect to this walkway made out of pallets between the hatch coaming of the No. 4 hatch and the railing, were you not?

A Yes, sir, I was.

Q In your experience, have you ever seen anything like that?

A Yes, sir, I have.

Q How often?

A Frequently.

In fact,in most cases where the deck of the vessel has a camber to it, a crown to it similar to the roadway out in the street and the section alongside the rail is actually a waterway to carry off any excess water and the hatch comings are rather high and the personnel is going to work on deck mibht be rather short so they have to see over that hatch coaming in order to properly carry out their work, therefore they need something to stand on.

Q In your opinion, is it usual and customary to construct a walkway made of pallets like that for the signalman or gangwayman to use?

A Yes, on ships that do not have the wooden hatch covers that we had on the older ship we use pallets. Where we have wooden hatch covers on ships, we use the wooden hatch covers to effect this walkway.

Q Captain, based upon your experience, do you have an opinion whether a walkway of this type made out of pallets is unsafe or dangerous?

MR. AUSLANDER: Objection.

That is a question of fact for the jury, not the captain. That is what we are here on trial for.

THE COURT: I think that is an ultimate question. Sustained.

Q Is it usual and customary to do this, to make a walkway of that type out of pallets?

A Yes.

Q There is nothing unusual about it?

A Yes.

Q And you heard CaptainStahl say there was nothing unusual about it?

A Yes, I did.

Q Is there anything unworkmanlike about that for a

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stevedore to make a walkway out of pallets?

MR. AUSLANDER: Again I will object.

THE COURT: Overruled.

I think it has been asked and answered but I will let it remain.

A The presence of such a walkway is not unsafe or unworkmanlike. In fact, sometimes the absence of such a walkway would be unworkmanlike.

MR. AUSLANDER: I will object and move it be stricken.

THE COURT: Strike the end of the response as an answer not responsive to the question.

The jury should disregard the last part of the witness' answer which does not respond to the pending question.

Q Just confine your answer, Captain, whether or not it is a workmanlike procedure for the stevedore to construct a walkway made of pallets the type you have heard described by Mr. Bernardini and Captain Stahl?

A Yes, such a procedure would be aworkmanlike act.

Q Would you give your reasons for that, for that opinion?

A Because it enables the man, the gangwayman to

actually see clearly and comfortably over a hatch coaming that with relation to his height is rather high. He needs it, in other words.

Q In your opinion, Captain, based upon your experience, is it necessary for the stevedore to do anything else in connection with such a walkway otherthan to put the pallets down?

A He puts them down and he proceeds to use them as he intends.

Q Is it necessary to put anything else down other than the pallets?

A To accomplish this, no. To enhance the visual area of the gangwayman, no, he needs the height, just the elevation.

Q Is it necessary for the stevedore to put anything down insofar as any passageway is concerned on the deck in connection with such a walkway?

A Not to my knowledge.

I can conceive in this set of circumstances that nothing else would be needed.

Q Over a period of 30 years, how many such walkways have you seen?

A The usual ship has 5 hatches and I have been aboard thousands of ships so I can't estimate how many times.

Maybe 20 or 30 per cent of them would utilize a raised elevation for the gangwayman to walk on in one form or another.

Q In your opinion, does such a palletway construction obstruct the passageway in any way?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Is it necessary for the stevedores to take any steps or take any action other than to put the pallets down to constitute a walkway?

MR. AUSLANDER: Again I will object to that.

THE COURT: I will sustain an objection to the form of the question.

Q In your opinion is it necessary for the stevedore to take any action or to do anything other than put the pallets down in forming a walkway made out of pallets?

A To the height indicated in this set of circumstances, it would be all that would be required, just laying the pallets down straight, fairly, in the desired position so the man can carry out his work to look over the rail and look over the hatch cover.

Q Would that constitute a workmanlike performance by the stevedore?

A It would in my opinion.

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MR. TESTA: You may inqure.

CROSS EXAMINATION

BY MR. AUSLANDER:

Q Captain, have you ever been on the Svensksund?

A I don't have any recollection of ever having been aboard the ship.

Q Do you have any idea whatsoever what it looks like?

A Oh, yes.

Q What?

A A modern conventional type small freighter, three hatches forward of the bridge housing, one hatch after. There are many such ships.

Q Do you have any idea how high the coaming is or was on that ship in October of 1969?

A From personal observation?

THE COURT: He said he didn't see the ship.

Have you examined plans of the ship?

THE WITNESS: Just fleetingly. I saw them here in court.

Q I show you Defendant's Exhibit C. Does it give you any dimensions?

A Are you alluding to the height of the hatch coaming?

Q I am.

A That dimension would not be displayed on this plan but the hatch coming itself is displayed on the plan itself in scale.

Q The hatch coaming itself that is displayed on there in scale is the outside perimeter, isn't that true?

A On the plan view, this view, the bird's eye view or the plan view. This is the side elevation view. There is your hatch coaming right there.

Q It still doesn't show the size of the hatch coaming?

A Yes. It shows me the hatch coaming and it is drawn to scale.

Q Does it show you how high the hatch caoming is?

A In relation to the other structure of the ship, yes, it does.

Q Can you figure it out for me?

A I don't know what the scale is. It isn't on here.

Q Here it is.

A That is deadweight scale.

Q What scale is this?

A That is a draft scale in meters.

The scale is usually righthere at the top or the

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lowr right-hand corner.

Q You say you were sitting here for the whole trial, and I think both I and the jury did see you sitting here for the whole trial.

A I sat here.

Q Did you hear how high the mate said the hatch coaming was?

A Yes. I think he said three and a half to four feet or three to three and a half feet. I heard those dimensions mentioned by various parties. I don't know what they are.

Q We could assume it is somewhere between three and four feet?

A That is reasonable.

Q Would you need an elevation to look over something three to three and a half to four feet high?

A For a short man.

Q Do they usually have midgets working as gangwaymen at ITO to your knowledge?

MR. TESTA: I am objecting to the use of the word midgets in this type of question.

THE COURT: Sustained.

Q When you say it depends on the height of the man, a three-foot man would have difficulty working over the

hatch coaming,would you agree with me?

A You never worked as a gangwayman.

Q Please listen to my questions, will you?

A I never saw a 3-foot man working as a longshoreman.

Q Nor did I.

A 4-foot man would have difficulty in looking over a 3-foot coaming, I wouldassume? A 3 or 4-foot coaming?

A Again, I never saw a 4-foot longshoreman.

Q But a 5-foot man, between 5 and 6 foot, which I think we can agree is the average height of men today, should have no difficulty in looking over a 3 to 4 foot coaming,should they?

MR. TESTA: Objection. There is no testimony in this case as to the height of the gangwayman.

MR.AUSLANDER: He said he never saw one of 4 feet.

MR. TESTA: I am making an objection for the Court. There is no testimony in this case as to the height of the gangwayman.

THE COURT: He is right. If you want to rephrase your question, you may.

I will sustain an objection but only as to form.

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Q Captain, in your experience as a marine consultant, as a stevedore supervisor, as a longshoreman, have you ever seen in all your years down on the piers a longshoreman 3 feet tall?

MR.TESTA: Objection. I think at this point we are being ludicrous.

THE COURT: Sustained.

Q Captain, do you know whether this vessel had a camber of its deck?

A All ocean going vessels have some camber to their weather deck.

Q What is the degree of camber, Captain?

A The difference of the deck level at the rail on a vessel of this class would be and from the difference of the level of the deck at the rail and the level of the deck at the mid point over the keel, the high part, would be anywhere from 12 to 16 inches, the height of a pitcher's mound.

Q You are telling me from the coaming over to the rail, you are going to have a 16-inch drop?

A I didn't say from the coaming. From the rail to the center line of the vessel which is halfway through the hatch opening.

Q The center line of the vessel?

A Right.

Q Let us talk from the coaming to the rail.

A I would say anywhere from 4 to 5 inches of level difference when the ship is on an even keel.

Q Where would the lowest part be?

A At the rail.

Q So if the coaming is 3 to 4 feet high from the deck, it would be 3 to 4 feet high, period.

A That is right, from the deck.

Q But when you go over to the rail, you are telling me there would be a 4 or 5 inch difference?

A In the level of the deck in relation to the plane through the keel when the ship is on an even keel.

Q I don't want to talk about from the keel. The keel runs through the center of the ship?

A That is right, for and aft.

Q We are talking about a space of maybe ten feet.

A From the hatch coaming to the rail?

Q Right.

A I was visualizing a space of 15 feet. All right, ten feet.

Q How much difference would you say?

A I would say about 4 inches, 4 to 5 inches. All

ships are built to shed water. As the seas come aboard, they are built for drainage.

Q Is this the first time you have been in court to testify?

A I am just trying to clarify that in your mind.

Q Did I ask you that?

A I am sorry.

Q As a matter of fact, you have been testifying in this court in cases that I have been involved in many, many years --

THE COURT: Don't you testify. Just ask a question.

Q Isn't that true, that you have been in court testifying in cases that I have been involved in for many, many years?

A I don't know what you mean by many, many years.

Q Haven't you seen me as counsel for plaintiffs for at least ten, fifteen years?

A I would say at least ten years.

Q And this is not your first experience in the courtroom?

A No, not at all.

Q Please listen to my question and answer my question without volunteering anything, okay?

A All right.

Q How wide is the rail of the ship?

A The top of the bulwark usually about 4 inches on a ship of this size.

Q About like this (indicating)?

A That is right.

Q If you stood at the rail and you wanted to look over at the dock, there would not be a broad expanse in front of your eyes, you could almost look straight down, is that so?

A Depending on the relative height of you and the rail.

Q The rail is how high from the deck?

A The rail is about --

MR. TESTA: I will object to generalized statements unless we are talking about the rail involved on the ship in question.

Q Do you know how high the rail of this ship was?

THE COURT: We already established that that is a plan without a scale and for the Captain to figure it out if there was no scale would be no more than a guess in the court's judgment.

Can you tell us from that?

THE WITNESS: Not to the degree. Only the

fact is that the ship's railing is lower than the hatch coaming.

Q Lower than the coaming?

A Yes.

Q That would mean then that the rail would be less than 3 to 4 feet high?

A I said less lower than the hatch coaming. I don't know how high the hatch coaming is.

Q We have already determined, have we not, the coaming is 3 to 4 feet high?

A If that is so, the railing would be somewhat lower.

Q And you still say you would need a platform to stand on to look over a wall or a rail that is less than 3 to 4 feet high?

A To do it comfortably all day and to look right over like I am looking over here, I would be uncomfortable if I had to do it all day, to do it comfortably all day, you have to have a platform or be raised up in elevation.

Q How high would you estimate this counsel table is?

A 30 inches. A table is usually 30 inches.

Q The rail would be at least another 4 inches, maybe, that is 3 feet?

A That is right.

MR. TESTA: The testimony is three to four feet and Mr. Auslander keeps referring to the minimal figure all the time. It could be four feet.

THE COURT: The jury recalls what the testimony was.

In any event, the hatch coaming would have been higher than that table?

THE WITNESS: That is right.

Q Are you telling us you would need a platform to stand on to look over something that is about as high as my hand is and only 4 inches wide, is that what you are telling us?

A To do it comfortably all day and to look close into the ship's side, the ship is docking alongside the pier and you are doing that all day, it is better to have a raised platform under your feet.

Q That is if you are about 4 feet tall?

A I said for the average man.

MR. STEARNS: Objection.

THE COURT: He answered it. Let us get away from midgets and people four feet tall and get on to the subject at hand.

Q You said before in answer to Mr. Testa's question

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that you have seen these platforms --

A Walkways.

Q -- in one form or another?

A Yes.

Q What is the other?

A The ship's hatch covers so placed that they serve this purpose.

Q In other words, you have only seen it either with hatch covers or with pallets?

A No. I have seen planks, gangplanks that were used on a split fall for this purpose so the gangwayman can go all to the rail. This was used too,as a sort of ramp.

Q When you use hatch boards, which you said you used, these hatch boards are some 30, 40 feet long, aren't they?

A No.

Q How long would you say they are?

A It's a full section hatch board, it's between 8 and 9 feet long. If it a half section hatch board, it's between 4 and 5 feet long, 3 inches thick and 18 inches wide.

Q Have you ever seen in your life small platforms near a coaming and near a rail in the event it was necessary

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for someone to look over or into?

A You mean fixed, permanent?

Q No, temporary.

A No.

Q Never saw it?

A I saw them constructed to suit the operation that is going on. I never saw a device so designed as to serve as a portable platform to a hatch. The first fault with it would be --

Q I didn't ask you what fault, I just asked you if you had seen it.

A No, it would be impractical.

Q Did I ask you that, either?

MR TESTA: I will object to Mr. Auslander badgering this witness telling him what he can or cannot say.

MR. AUSLANDER: This man is a professional witness.

MR. TESTA: I object to that.

THE COURT: The jury will disregard all of the comments of counsel.

Let us get on with the question.

MR. TESTA: For a man who brought Dr. Graubard here --

THE COURT: Mr. Testa, you owe an apology to the

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court.

MR. TESTA: I apologize.

THE COURT: Accepted.

Proceed.

Q Captain, have you ever heard of a 3-foot walking area around hatches?

A Yes.

Q What does that mean?

A That means that in the area around the hatch that there shall be three foot free of obstructions or loose gear not being used.

Q Or anything that will obstruct --

A Not anything. Anything that is a serious obstruction or loose gear not being used. If it is not necessary to be there, it shouldn't be there.

Q Where does this 3-foot rule come from?

A Custom and practice down through the ages.

Q Is it also a part of any regulations, do you know?

A It has been published, promulgated.

MR. TESTA: I will object to any questions with respect to regulations. This is the province of the Court and I will object to any testimony by Captain Wheeler with respect to any regulations which is the function of

the Court.

THE COURT: Any regulations which were or are in force or effect, if counsel will apprise the Court of those, the Court will take judicial notice of those and will advise the jury in its charge of that regard.

Q Be that as it may, Captain, forgetting about any formal regulations for the moment, you say it is custom and practice in the industry to have a 3-foot walking rather around hatches?

A Reasonable. 3 foot is reasonable. It doesn't have to be exact.

Q I guess it could be 2 feet 11 inches?

A 2 and a half feet.

Q No one would quarrel with you?

A That is right.

MR. TESTA: Again I will object. Custom and practice does not govern.

THE COURT: I didn't hear him say anything about regulations. We are now discussing what counsel seems to think is customary and what the witness seems to think may be customary. I want to stick to that line now until counsel is prepared to depart from it.

If counsel wants to proceed along the lines what is custom and practice and customary, he may do so.

If he wants to go to a new line of inquiry, he may do so.

Would you say, Captain, that slippery substances on a walking or working area should be eliminated by crew of the vessel?

MR. STEARNS: Objec t to the question.

THE COURT: Sustained.

Q Captain, in your opinion when there is a presence of a slippery substance on a vessel, is it the province of the mate to alleviate that situation?

A It could be.

Q It could also be the stevedores?

MR. TESTA: Objection if your Honor please.

Again counsel is attempting to circumvent a situation which is properly within the province of the court.

THE COURT: Sustained.

The Court and the jury.

Q If the deck is cambered and you are walking on the pallet, would it tip?

A No, because when the pallet is so placed, it is placed in such a manner that it eliminates part of the camber of the deck.

Q Isn't the bottom of the pallet straight?

A Yes. There is an angle bar at the edge of the

deck.

Q Is it a wooden bottom?

A Yes, wooden plank.

Q What does it look like?

A It is a wooden platform. The top surface consists of parallel planks fastened to 3 by 4 timbers that run across the planks and you turn it over and it has a similar decking. It can be used on either side. The typical stevedore pallet is double faced. The warehouse pallet is usually a double face.

Q These are flat?

A Relatively speaking.

Q Sort of like this?

A Not so flat. Not uniformly flat. It is relatively flat. It is not like a table top, it is a rough surface.

CROSS EXAMINATION

BY MR. STEARNS:

Q Captain, you testified if I understood you, there is nothing unusual or unreasonable about having a pallet walkway constructed between the railing ahd the coaming?

A No. In fact it is needed in some cases.

MR AUSLANDER: Again I object to the superfluous answer the captain is tacking on.

THE COURT: Captain, do try to keep your answers

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responsive.

Q Captain, is that opinion given in recognition of the fact that you would expect that longshoremen would be able to step on and over a pallet lying on the deck without any difficulty?

MR.AUSLANDER: Objection.

THE COURT: Sustained.

Q Is that opinion again in recognition of the fact that an alert longshoreman watching where he is going will not have any difficulty in stepping over one of these pallets?

MR.AUSLANDER: Objection.

THE COURT: Sustained.

Q Captain, it is true when drafts of cargo are loading into the hold of a ship, the draft is ordinarily placed as close as it can be to where it is going to be stowed, isn't that so?

A Landed.

Q Landed?

A It is landed as close as possible to eliminate unnecessary manual handling.

Q Does that mean when a draft of cargo is eventually going to be stowed in one of the wings or recesses of the hold, it would come down as close to the edge of the

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square of the hatch as possible?

A That is right.

Q Explain what you mean by the square of the hatch?

A That is the opening, the rectangular opening with square corners, usually square corners that is encompassed or enclosed by the hatch coaming. It gives the access through the ceiling as it were, these squares up here could be considered a hatch opening and the square of the hatch is the area right under the hatch coaming.

Q Captain, showing you Defendant's Exhibit D-6, can you point out on that where the square of the hatch would be?

A The square of the hatch area of the weather deck, these two men are standing on one cover. They are standing on the square of the hatch. These people shown in the tween deck area, they are crossing or spanning the square of the hatch. The square of the hatch is a space.

Q I ask you to assume the covers were as shown here and the longshoremen were going to stowe cargo in the inshore aft corner of the tween deck. That of course would be in here, would it not?

A Very close to a point that is plumb under the coaming.

Q Would the longshoreman in the exercise of custom

and practice that is normal and usual in the Port of New York attempt to land that draft close to a point plumb under the edge?

MR. AUSLANDER: Objected to. There has been no testimony as to where cargo was being loaded in that hatch. It could have been in the lower hold, offshore, inshore, aft or forward.

THE COURT: Sustained.

MR. STEARNS: I think it is entirely --

THE COURT: Sustained.

MR.STEARNS: I am asking him to assume --

THE COURT: Sustained.

Q If such a draft was being landed in such a position, would it be required that the gangwayman lean over the rail to get the best view possible?

MR.AUSLANDER: Objection. There is still no testimony as to how or where the cargo was being loaded and Mr. Stearns is doing exactly the same thing.

THE COURT:Let me ask the captain a few question.

You heard the testimony relative to the No. 4 hatch and its size.

What were the dimensions of the hatch opening?

THE WITNESS: What I heard was about 25 feet. I think he said 8 meters. It is about 25 feet,fore and

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aft.

I don't think I heard any definite measurement as to the width of the hatch opening but I would expect it to be something like 20 feet.

THE COURT: Something like 20 feet by 25 feet would be the dimensions?

THE WITNESS: Yes.

THE COURT: What are the size of these pallets?

THE WITNESS: Standard stevedore pallet is 4 feet by 6 feet.

THE COURT: As I recall Captain Stahl's testimony, he indicated that the vessel was being loaded.

THE WITNESS: I recall that.

THE COURT: As I understand the loading operation where possible you load from the bottom of the hold up?

THE WITNESS: From the bottom of a compartment. That doesn't mean you have to load the lower hold first. You could load the upper tween deck first. All you have to do is maintain stability of the entire ship.

THE COURT: You can see the upper tween deck rather easily if you are standing at the hatch coaming whereas it is much more difficult to see down into the deeper part of the hatch?

THE WITNESS: That is right.

THE COURT: You have no idea whether they were beginning loading at the bottom, in the middle of the loading or loading the tween decks?

THE WITNESS: I heard no testimony to that effect.

THE COURT: In any event, would a certain rigging be set up for a loading operation at the beginning which would be used throughout the loading operation?

THE WITNESS: Yes.

THE COURT: In other words, it would be financed first, it wouldn't matter whether you were beginning at the top or going down to the bottom?

THE WITNESS: That is right.

MR. AUSLANDER: I didn't understand your last question. What do you mean it wouldn't matter?

THE COURT: I don't want to address the jury. If you wouldn't mind I will ask the captain a couple of more questions.

MR. AUSLANDER: I wish you would otherwise I would have to object to that question.

THE COURT: Captain, when the ship arrives in port and the stevedores come aboard, is it at that time that they make all their preparations and do all their rigging for the loading or unloading of the ship?

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THE WITNESS: That is the time they do the principal and comprehensive rigging. They might make minor adjustments at any time thereafter but they would only be minor adjustments.

THE COURT: If a platform was to be set up of pallets, would it be set up at the beginning of the loading operation or would they wait until they got to a certain depth of the hold in connection with the loading of the ship before they installed the platform?

THE WITNESS: It would be set up at the beginning of the operation.

THE COURT: Would it be retained in place until the loading operation was concluded or would it be removed when they got up toward the upper part of the hold?

THE WITNESS: It would be retained as lon as it was needed. If they didn't need it in the upper tween deck, they would remove it. If they were going to load deck cargo in the way of that platform, they would remove it and replace the platform over the deck cargo. It is a very flexible situation. You can't make any generalized decision.

THE COURT: And you have no way of knowing how the cargo was loaded aboard the Svensksund?

THE WITNESS: No.

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Q Captain Wheeler, if they are loading a draft and attempting to place it as close as possible to where they are going to stowe it and they are going to stow in the tween deck, the wing, would it be necessary for the gangwayman to peer over the side and wouldn't it help him to have a little additional help?

A Yes.

MR. AUSLANDER: I am going to object to it.

THE COURT: He answered.

MR. AUSLANDER: He saw me standing here. This man is not the first time in the courtroom.

THE COURT: You said that before, too.

MR. AUSLANDER: I ask your Honor to direct the witness once more to answer a question only that is asked of him.

THE COURT: Captain Wheeler, if you see one of the counsel standing to object, please do not respond until he has had a chance to make his objection and the Court has had the opportunity to rule.

Q Captain Wheeler, in case of a situation where there is some slippery condition on the deck, you testified it could be the responsibility of the ship's officers to do something about it. Could it be the responsibility and in fact isn't it the responsibility

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of the stevedore as well?

MR. TESTA: Objection.

THE COURT: Overruled.

MR. TESTA: Again counsel --

THE COURT: Overruled.

A It could be, yes.

Q Isn't it true in the maritime industry as it is in any industry as it is in any place in common sense the responsibility of anybody who sees a slippery condition to do something about it?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Is it the obligation of a longshoreman who sees it, this alleged slippery condition to report it?

MR.TESTA: Objection.

THE COURT: Overruled. It is assuming something. I know it is not in evidence.

MR. TESTA: There is no testimony that anybody saw it.

MR. STEARN:S There is testimony the plaintiff saw it.

THE COURT: It may be presumed from that there wasn't anything. I will let the witness answer.

Q Assume that the plaintiff said he saw grease,

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tried to dodge it, took tippy-toed steps, assume further that he claims he slipped.

Doesn't he have an obligation to report this condition?

A Yes,he does.

MR. TESTA: Because he said he saw it too late to do anything about it.

THE COURT: There is a different thrust to his question if I understand it.

The question is overruled.

MR. TESTA: I don't understand the thrust.

The only testimony in this case --

MR. STEARNS: Let us not have a recitation.

THE COURT: Please, no speeches, I have ruled, let us get on with it.

BY MR. STEARNS:

Q Captain Wheeler, for the purpose of this question, forget the dispute between myself and Mr. Testa, the jury heard evidence when he saw it or when he claimed he saw it, isn't it his obligation if he did see some condition like that to report it to somebody?

MR. TESTA: Objection.

MR. AUSLANDER: I will object also.

MR. TESTA: What is the purpose of reporting some-

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thing after an accident happened?

THE COURT: Maybe so someone else wouldn't fall. Overruled.

MR. TESTA: That would have no bearing on this case.

THE COURT: It definitely has a bearing and I am surprised you are objecting to it.

A Yes, everyone takes part in a safety program including the labor. The leadership encourages safety measures but the labor, the workingman himself. If he sees grease, he doesn't work it.

THE COURT: Gentlemen, the reporter has advised me that you both stand up and talk simultaneously. You have been doing that the last few minutes. He can take but one comment at a time and he does that very well, but please from this point on, I would ask that you address the Court separately and not jointly.

We will now proceed. The reporter did not get the last question and if you can again.

Q When you speak of the leadership, do you mean ITO supervisory personnel?

MR. TESTA: Objection to the question. The question is who does he mean, not does mean this, that or some other person.

MR. STEARNS: This is cross examination.

THE COURT: It is cross examination. He is entitled to lead.

A Yes, among others.

Q And it is the obligation of each longshoreman if he sees grease to report it, isn't that so?

MR. TESTA: Objection again.

THE COURT: Sustained.

You have been over this ground.

REDIRECT EXAMINATION

BY MR. TESTA:

Q Captain Wheeler, you were here when Captain Stahl testified, were you not?

A Yes, I was.

Q I believe you heard him say that the wheels on the hatch coaming were greased by the ship's carpenter?

A Yes, I did hear that.

Q And you heard him testify with respect to what his obligations were, didn't you?

A Yes, I did.

Q Did you hear Captain Stahl say that he was responsible for the safe condition of that deck?

A I did.

Q Do you agree with that?

A Yes, I do.

Q Did you hear Captain Stahl say that his job was to control the crew and to look out for safety aboard the vessel?

THE WITNESS: That is right. That is part of his job.

Q Do you agree with that, Captain Wheeler?

A Yes, I agree with him.

Q Did you hear Captain Stahl say that if he saw the stevedores doing something wrong he would put a stop to it?

A Yes, I heard him say that.

Q Do you agree with that?

A I agree with that.

Q Did Captain Stahl say that he had specific orders from the company to look out for safety conditions on the vessel?

A I heard him say that.

Q Do you agree with that?

A I agree with that.

Q If he saw any oil and grease on this vessel, did you hear him say that he would remove it or would have somebody remove it?

A I heard that.

Q Do you agree that it was his obligation to do that?

A Yes.

Q And if there was anything unsafe about that deck, you would agree it was Captain Stahl's obligation and responsibility to do something about correcting it?

A Personally? It is the ship's obligation.

Q He is responsible for the condition of the ship, isn't he?

A In part.

Q He is responsible for the condition of the deck, isn't he?

A Yes, in this particular cargo area.

Q If he saw any grease on that deck, it is his responsibility to have it removed?

A If he saw it, yes.

Q If there was anything wrong with that pallet walkway, it would be his responsibility to do something about it?

MR. STEARNS: Objection. I don't think there is any such testimony.

THE COURT: Sustained.

MR. TESTA: All right.

MR. STEARNS: I have a couple.

THE COURT: Mr. Auslander goes first.

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RECROSS EXAMINATION

BY MR. AUSLANDER:

Q In response to the Judge's questions, you said the ship is rigged up for loading at the beginning when it first comes in?

A Yes.

Q There are changes that are made during the course of cargo operations, is that not true?

A I said minor changes are made.

Q For example, they may spot or move the boom from place to place?

A That is a minor change.

Q Minor or major, that is one of the things they do?

A I agree.

Q And when you spot the boom, you have to let go certain wires so you could move the boom in the place where you want it to be then you lock it down, so to speak?

A It depends on the arrangement aboard the particular ship.

Q It depends on what?

A It depends on the rigging arrangement aboard a particular ship. You are speaking in general?

Q Yes.

A Some you could do it without touching it, some you just press a button. Others you have to manually handle the rigging components.

Q You heard Captain Stahl say there was somebody on the port side, the offshore side who was working with the boom?

A I heard that.

Q And that would be an expected operation during the cargo loading procedures, is that correct?

To change the spot of the boom?

A At intervals. You do it once or twice during the loading of the hatch. You don't do it continually.

Q Isn't it a fact that the normal and usual loading procedures is to start at the bottom, put whatever has to go into that hatch,close it up with the hatch boards then work on the next deck level?

A No.

Q That is not the normal and usual?

A No, there is no need for it. You are not building a ship, you are loading a ship.

Q I understand that,Captain.

MR. AUSLANDER: Again I ask the Court with this witness who has been here many times to be responsive.

THE COURT: Please.

MR.AUSLANDER: I can't say it any more times.

THE COURT: Captain Wheeler, you must be responsive to the questions much as you are anxious to assist, you should not volunteer.

Q Do you know that the ship left at approximately 3 o'clock that day?

A I don't know that.

Q Did you hear Captain Stahl say that?

A It didn't register with me if he did say it.

Q It left from New York and went down to Baltimore?

A Yes, Norfolk, I think. I don't think he said 3 o'clock.

Go ahead.

Q 1500 hours, what time is that?

A 3 p.m.

Q So cargo operations were being completed at that time?

A I presume so.

Q And you indicated, I believe, when you don't need the walking boards, you take them away?

A That is right.

Q You don't leave it there from the moment you open up on the girst day which was the day prior until the very end if you don't need them?

A If you don't need them. If you need them, they stay there.

Q Pallets which are lying in the way would not be considered by you as a tripping hazard?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Would it be considered by you as a tripping hazard?

MR. TESTA: Objection. There is no testimony that anything was lying around loosely in the way here.

THE COURT: Sustained.

Q Captain, are pallets a normal part of the vessel?

A They don't belong to the vessel.

Q What I am saying is, is it normal that the pallet is going to be on the vessel during its voyage?

MR. TESTA: Objection.

THE COURT: Sustained..

Q It is a movable object, isn't it?

A Of course.

Q Would you consider a movable object that is in the walking area a tripping hazard?

MR. TESTA: Objection.

THE COURT: Sustained.

MR. AUSLANDER: That is all.

RECROSS EXAMINATION

BY MR. STEARNS:

Q You heard Captain Stahl testify to his responsibilities and you agree?

A Right.

Q The stevedore supervisory personnel have a responsibility --

MR. TESTA: Object to any questions about the stevedore liability. This is something for the Court.

MR. STEARNS: No, it isn't.

THE COURT: Overruled.

A Yes. I said that I think the safety, that all hands take part in it.

Q And supervisory personnel such as ship foreman, hatch boss are instructed in safety, are they not?

A Yes.

Q And in addition, ITO has a safetyman?

A Yes.

Q And his job is to go around and look for unsafe conditions?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Do you know what his job is?

A Yes.

Q What is his job?

MR. TESTA: Objection to his testifying as to what the ITO's man job is.

THE COURT: Sustained.

Q Did you hear Captain Stahl testify to that?

MR. TESTA: To what?

Q What the function of the ITO safetyman was.

MR. TESTA: Objection. There was no such testimony.

MR. STEARNS: I am entitled to ask it now.

MR. TESTA: No, you are not.

THE COURT: Objection?

MR. TESTA: Yes.

THE COURT: State your grounds.

MR. TESTA: First of all, Captain Stahl did not testify. All he said was there was such a man. He never testified with respect to his job, duty, title, capacity or anything else and I am objecting to any testimony by Captain Wheeler.

THE COURT: You are now on recross examination. I don't recall at any prior point the testimony of Captain Wheeler that that was any testimony regarding the ITO safety man. There may have been testimony in this regard from another witness but I don't recall

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it from Captain Wheeler.

MR. STEARNS: Your Honor, inferentially --

THE COURT: Not inferentially. I want to know whether you are telling the Court there was prior testimony from Captain Wheeler in this respect.

MR. STEARNS: There was not.

Mr. Testa is making a great deal --

MR. TESTA: Objection.

THE COURT: No speeches.

MR. STEARNS: Can I have the question read back? Would you read it back?

THE COURT: You don' give directions to the reporter. You know what you are supposed to do.

Any request that you make is to be made to the Court and any directions are to be given by the Court.

MR. STEARNS: May I have the reporter read back my question.

THE COURT: Mr. Kaufman, please.

(Read.)

MR. TESTA: My objection is that Captain Stahl did not so testify and Captain Wheeler never so testified.

THE COURT: Objection sustained.

Q What is the function of the ITO safetyman?

MR. TESTA: Objection. This is thesame question

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again?

THE COURT: Sustained.

MR. STEARNS: May I be heard at the side bar?

THE COURT: No.

Q Is the ITO safetyman responsible for --

MR. TESTA: Objection.

Q -- the safety of ITO personnel such as the plaintiff?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Does the ITO safetyman have certain duties in connection with trying to protect --

MR.TESTA: Objection.

Q -- against accidents?

MR. TESTA: Objection.

THE COURT: Captain Wheeler, answer me one question yes or no.

Do you know anything at all from your actual knowledge about the duties of this so-called ITO safetyman, yes or not?

THE WITNESS: No, sir.

MR. STEARNS: Your Honor --

THE COURT: The witness has answered no.

MR. STEARNS: May I pose one more question?

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MR. TESTA: I object to counsel making speeches in the form of questions.

THE COURT: He is asking a question.

Q Captain, are you familiar with custom and practice as it was in 1969 in October relative to the duties of a safetyman employed by a stevedoring concern such as ITO?

MR. TESTA: Objection.

MR. STEARNS: Throughout Captain Wheeler has testified to custom and practice as an expert witness.

THE COURT: Yes, but I asked him a question which was specific. He didnAt know.

MR. TESTA: He said he didn't know and I am pressing my objection.

THE COURT: Objection sustained.

MR. STEARNS: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. TESTA: I have no other witnesses.

THE COURT: Are there any other witnesses here in the courtroom today or the courthouse?

MR TESTA: I have no other witnesses.

THE COURT: Very good.

Ladies and gentlemen, we will take our recess

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at this time.

Let me give you a little idea of the schedule.

We will recess now and you will return here Tuesday morning at 10 o'clock. At that time we will hear the testimony of Dr. Lodico. Following his testimony, if there are any other witnesses to be presented, they will be presented forthwith. If not, or even if they are, following their testimony, the testimony will be at an end and you will be hearing the closing arguments of counsel followed by the charge of the court.

My present estimate is that the closing arguments will occupy a period up to the luncheon recess and that I will present my charge to you immediately after the luncheon recess at which time the case will be given to you for your deliberation.

All things are subject to change but my present thinking is this case should be given to you for your deliberation some time next Tuesday.

As you leave to go home, I would direct you again not to discuss this case except in the jury room when all members of the jury are present, not to remain within the hearing of anyone discussing this case; if you should overhear any portions of conversations relating to this case, I direct that you report the matter to me at once.

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Finally, I request that you keep an open mind on the case until all of the evidence is in, until you have heard the closing arguments of counsel and the charge of the Court and thereafter you would be permitted to retire to the jury room and deliberate on the case.

Have a pleasant weekend including the Monday holiday, we will see you right fresh Tuesday at 10 o'clock.

(Adjourned to Tuesday, October 23, 1973, at 10 a.m.)

rkrf 1

Frank Bernardini

vs

Rederi, et al.,

New York, New York
October 23, 1973 - 10:30 a.m.

(Trial resumed.)

(In open court, jury present.)

THE COURT: Good morning, I hope the jury had a pleasant holiday. I know you have been in here bright and fresh before 10:00 o'clock. It is now 10:30 and as you were probably aware I had certain business on the criminal side which I have now concluded and I can only report that the rest of the day belongs to counsel and the jurors.

I anticipate from what I indicated to you the other day that this should be the final day of the trial and of course you are now entering into your second week of jury service so when the case is given to you, you will have adequate time to think on it and to deliberate on the matters which you have heard during the course of the last several days.

We will proceed.

If my recollection is correct, we have reached the point where Dr. Lodico is supposed to be here.

MR. STEARNS: That is correct.

Dr. Lodico, would you please take the stand.

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DR. VINCENT LODICO, called on behalf of Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STEARNS:

Q Dr. Lodico, are you a doctor of medicine licensed to practice in the State of New York?

A Yes.

Q Would you give us a brief resume of your professional and working background?

A I obtained my present medical education at Columbia University and received a BS degree in 1937. I then attended the New York Medical College Flower Fifth Avenue Hospital and received an MD degree in 1940. I had a two-year rotating internship at City Hospital which is now known as the Elmhurst General Hospital of Queens.

After that I had approximately five years of a surgical residency training at the New York Post Graduate Hospital which presently is known as the University Hospital, affiliated with Bellevue.

Included in that time was a one-year of a preceptorship which is a surgical relationship with a former head of the AMA, a surgeon, by the name of Charles Gordon Hayd.

After that I became attending surgeon on the staff of the St. Clare's Hospital in New York City, the Columbus Hospital in New York City and also I was an attending on the fracture and orthopedic surgeon list of the Columbus Hospital.

I am a Diplomate of the American Board of Surgery. I am also a Diplomate of the International and Foreign College of Surgeons, American College of Surgeons. I hold a specialist rating for treating Workmen's Compensation cases in the State of New York and I have the code letters of SAC. The S stands for specialist. The A stands for major general surgery and the C stands for major traumatic surgery which is the surgery of fractures, sprains and other treatments to various injured portions of the body.

I belong to the usual state and medical organizations and I am also part of the teaching staff of the St. Clare's Hospital teaching post graduate surgery to the residents who are taking up that speciality.

Q Doctor, did I ask you to examine the plaintiff in this action, Frank Bernardini, for us, the defendant in connection with this case?

A Yes.

Q When was the date of that examination?

A August 23, 1971.

Q At that time, did Mr. Bernardini give you a statement of his complaints as of that day?

A Yes.

Q What were those complaints?

A He indicated that he has pain in the right shoulder that comes on once in a while and with prolonged use and also on arising in the morning.

Q Was that the entire sum of his complaints on that day?

A Yes.

THE COURT: What was that date?

THE WITNESS: August 23, 1971.

Q Did you conduct a physical examination of Mr. Bernardini?

A I did.

Q What did that physical examination show?

A In essence there was a general survey of the patient. He looked healthy, was not in pain. He was completely oriented mentally and there were no gross defects which involved his body or his ability to think and coordinate mentally. I had the patient disrobe and the shoulders presented normal anatomical contours. He was able to place the right shoulder through a normal range

of motion which covers straight arm raising. Internal rotation, sternal rotation, and abduction and adduction. These motions were carried out simultaneously with the opposite normal shoulder and the range of motion was identical.

He had no pain during this examination but I did ask him when it did hurt him where the pain was and he indicated in a general way the region of the deltoid muscle which is approximately the region I am pointing to with my index finger.

I pressed over that area and there were no trigger points of pain which would have indicated to me any remaining injury from his alleged accident.

The muscles of the entire shoulder were preserved, indicating that he had normal use of this extremity like he did on the opposite side.

In essence, the examination was a normal examination without any objective signs of injury and there were no subjective complaints, though the patient did indicate upon being asked by me where it hurt and he indicated once in a while it is the area of the deltoid muscle.

Q Is it fair to say based on your examination of Mr. Bernardini conducted August 23, 1971, that you found absolutely nothing wrong with this patient, to this man's right shoulder?

A Yes, I would say that.

Q And at that time he had no complaints of pain in his right shoulder?

A That is correct.

Q And the range of motion of the shoulder was entirely free?

A That is correct.

Q At that time he had no pain?

A That is correct.

Q At that time there was no evidence of swelling?

A No.

Q No external evidence of any kind of injury?

A No.

Q No evidence through any evaluation that you conducted of any internal injury to the right shoulder?

A None.

Q Your examination was entirely negative?

A That is right.

Q Did you express an opinion that this man could continue working, needed no medical treatment?

A That is correct.

Q No care of any kind?

A None.

Q No evidence of injury whatsoever?

A None.

CROSS EXAMINATION

BY MR. AUSLANDER:

Q Dr. Lodico, do you make many physical examinations on behalf of defendants' attorneys?

A Yes.

Q How many would you say you make in a day?

A I couldn't give you that number, I really don't know. I could give you an approximation which again is not an accurate number but merely an educated guess on my part what I may be doing per week on the average.

Q Let me have that.

A I would say over the years that I have averaged approximately 15, sometimes it may have been a little bit more, sometimes less, depending what I am doing.

Q 15 a week?

A Yes.

Q If my mathematics are correct, that is about 780 a year?

A If you multiply that by 52 you may get that.

As I said before, there is nothing regular in my practice or for a matter of fact any doctor and like this past week it was an extremely erratic week where I wasn't even in New York.

I just gave you that to answer your question.

Q As a matter of fact, isn't it accurate to say that when you come into court to testify, the vast majority of your appearances here are on behalf of defendants?

A I don't have vast numbers. I do come to court. I don't know the exact number but I presume I may average about 12 to 15 appearances per year and the greater number of those cases are for defendants.

I have also appeared for plaintiffs.

Q I didn't ask you that.

A It is part of your question and it is part of my answer.

Q I don't want to argue with you, but isn't it a fact that the vast majority of your appearances in court are on behalf of defendants?

A Yes.

Q You rendered a report to Mr. Stearns, did you not?

A That is correct.

Q And you said in your report, did you not, that medical reports concerning this patient's injuries --

MR. STEARNS: Your Honor, we object to this and I would suggest a moment at the side bar if the Court is so inclined.

THE COURT: Let's hear the question first. It may

be that your objection will prompt counsel to rephrase his objection and if he has finished the question, I will hear an objection at the side bar.

MR. TESTA: I think counsel is about to read something and it shouldn't be heard. That is the whole purpose of the objection.

THE COURT: If counsel wish to approach the side bar now, I will hear you.

MR. AUSLANDER: I didn't even finish my question.

THE COURT: They are apparently concerned you are going to read something which they don't want heard by the jury.

We will hear you at the side bar.

(At the side bar.)

THE COURT: First let's hear the question.

MR. AUSLANDER: There is this paragraph that I have double-lined.

THE COURT: What do we have so far in the question.

(Question read.)

THE COURT: And you intend to say which were submitted by the physician is indicated and would have been reviewed and used in conjunction with this examination.

That is the thrust of your question?

MR. AUSLANDER: Basically paraphrasing it.

MR. TESTA: The medical reports that the doctor is referring to are referred to again on the first page of this report. He is referring to Dr. Graubard's report and again he is trying to get medical reports into evidence.

MR. AUSLANDER: I am not. I am not going to introduce any medical report.

MR. STEARNS: Let me get this point clear.

As I have indicated, I think it is my obligation in every case to send to a doctor every medical report we have.

THE COURT: It gives him the best background in order to make his examination.

MR. STEARNS: There are many situations where I will ask questions of a doctor which call for his review of these records. For example, I would ask Dr. Lodico whether in his opinion the injuries diagnosed by Dr. Tagliagambe would persist beyond a short period of time or whether he is surprised to see that the man has no evidence of injury; which would open the door to a lot of questions that Mr. Auslander wants to pursue.

The simple thing is this. I have asked Dr. Lodico to testify and he has testified solely as to the

man's physical condition on August 23, 1971, particularly in view of the fact that a treating doctor has testified to what the injuries were. What his opinion of his prognosis was, what his findings were a short time later.

It would be presumptuous for me to ask Dr. Lodico.

THE COURT: If I should permit this on cross examination, it doesn't become presumptuous any more and on redirect examination it seems you can go into this and bring into the record obviously that he dissents from the other doctor's view of the injuries.

MR. STEARNS: Cross examination is limited to matters brought on on direct examination. I ask the Court to permit cross examination only of what Dr. Lodico has testified the man's condition on August 23, 1971.

If Mr. Ausland wants the opinion, drag in here by the coat tails of any doctor and, he could subpoena the man for $20 and get it. It's absolutely absured to permit -

THE COURT: I think for him to do it would be a grave mistake. He knows what Dr. Lodico is going to say. What he is saying now basically is this. He is asking the doctor"you examined this man and you had before you a number of reports, did you not, Doctor," and the doctor will probably say, yes.

MR. STEARNS: He will say yes.

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THE COURT: Then he will try to specifically ask him which reports he had before him when he examined the man and you are going to object and I am going to overrule your objection.

MR. TESTA: Then we will get in what is in those reports.

THE COURT: He has already represented to the Court and I accept this, he is not going to offer any reports. He says he wants to inquire relative to what the doctor had before him in the way of material and information when he examined the man.

If he does attempt to do something that he has represented to me he is not going to do --

MR. AUSLANDER: I will ask questions. I have a perfect right to ask questions.

MR. STEARNS: For example, there is a doctor named Schultz who found two and one-half per cent of the shoulder. Mr. Auslander is doing his job, is going to ask the question, "Do you consider the fact that Dr. Schultz found this?"

THE COURT: If he were to ask a question like that in that form and you were to object, I would sustain your objection. I doubt very much he is going to ask this.

MR. TESTA: But it is before the jury.

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MR. AUSLANDER: Am I not permitted to ask the doctor whether or not he agreed with any of the findings of any of these other doctors?

THE COURT: How could you premise it with the findings?

MR. AUSLANDER: He read the reports. Does he find fault?

THE COURT: If you ask him if he read the reports and does he agree with the reports, I will let you ask that despite their objection.

MR. TESTA: Without indicating what they are.

THE COURT: Of course, but I think it has very frankly very little probative value for you. Basically you know how your case has shaped up. Here you have a dispute between doctors. I am telling you this now, though there is a technical rule that the cross examination does not go beyond the scope of direct examination if I held it to a finite line, I would not be aiding the cause of justice because let me suggest something to you: You are putting this man on as a defense witness. He could turn around if he wanted to, he could say, "All right, Doctor, you are in court and I am directing the judge to ask you to wait and as soon as you rest," he could put him on the stand and he is in the same bind and I will not go

through that. I will limit him very carefully. I will not permit him to put in things indirectly that he couldn't put in directly, but I will give him what I believe to be reasonably latitude just as I tried to give you the same.

MR. STEARNS: I understand that and the motivations. I am not trying to impune that at all. This is an unfortunate attempt on the part of the plaintiff's attorney to drag in the back door opinions and suggestions of doctors who are not here in court.

MR. TESTA: And who we have no intention to cross examine.

THE COURT: Let him ask the question. If you find an objection to the question when it is asked, make your objection, I will rule. I recognize what your objections are. I have given you my tentative thoughts but if the questions come out differently than I anticipate, I may rule in your favor.

(In open court.)

THE COURT: You may proceed, Mr. Auslander.

BY MR. AUSLANDER:

Q Doctor, I started to ask you, whether when you first started to examine Mr. Bernardini, you had before you medical reports by other physicians who had examined him and whether those reports had been reviewed and used

by you in conjunction with your examination and report of Mr. Bernardini?

A I had medical reports at the time I saw Mr. Bernardini and I read those reports to brief me on the background of his medical injuries and findings, et cetera, so it would bring me up to date insofar as this past history of the patient's injuries are concerned.

I did read that, then I proceeded to examine the patient and arrive at my own conclusions.

Q You also said, did you not, they were reviewed and used in conjunction --

MR. STEARNS: I believe the doctor just answered the question.

THE COURT: Do you have the question in mind?

THE WITNESS: Yes.

A As I said just before, I used these medical reports merely to brief me on the background that preceded my examination. It merely told me what the history was, what the injuries were and what the other doctors had found but beyond that point, I proceeded with my examination, made my own findings and drew my own conclusions.

Q Do you recall what the injury was to the man?

MR. STEARNS: Object to that. That has been asked of Dr. Tagliagambe.

THE COURT: Overruled.

A The injury that was claimed as given to me was as follows:

Abrasion of the right shoulder.

Q Abrasion?

A Yes.

Q Did you know that Dr. Tagliagambe testified among other things that there were abrasions?

A Maybe my secretary left out an S.

Q Doctor, I am not asking you for long involved answers. The questions I put to you are simple ones that can be answered by a simple yes or no.

MR. TESTA: I think this is objectionable. Whether Dr. Lodico knew what Dr. Tagliagambe found is not material.

THE COURT: Did you have a report of Dr. Tagliagambe in your file or in front of you when you examined the plaintiff?

THE WITNESS: I did, your Honor.

THE COURT: Did that report reflect anything relative to abrasion or abrasions?

THE WITNESS: Dr. Tagliagambe used the word abrasions in one context. I used it in the same contact which means many abrasions in the same area.

THE COURT: Am I correct that abrasions or an abrasion would be understood by us lay people to be a bruise or bruises?

THE WITNESS: Yes. It's like a superficial scratching of the skin so the skin may look scratched up superficially. It may lose a little bit of serum, there may be a little tenderness over the area and it may appear red. The word abrasion of an area is exactly the same thing as another doctor saying abrasions, because abrasions are fine superficial scratches and if you damage an area of the shoulder visible to the eye, obviously you have more than one scratch. So when I said abrasion, I was saying exactly what Dr. Tagliagambe said when he said abrasions of the shoulder.

Q Were you also saying the same thing when Dr. Tagliagambe said that the man had a contusion?

A Abrasions and contusions are twins, they are really part of the same picture.

Q But they are two different words medically?

A Yes. We have a lot of words --

Q Were you also saying the same thing --

MR. STEARNS: Can I have the doctor finish his answer?

THE COURT: Yes.

A You can't get an abrasion without contusing an area.

Q You can't what?

A You can't abrase an area without contusing an area so I merely used the economy of words to describe the clinical picture that the patient has.

Q Were you also using an economy of words when you omitted the word sprain?

A No, that was not an economy of words. It was left out because this is the manner in which the injury was given to me at the time the patient was seen.

Q You said you reviewed Dr. Tagliagambe's report?

A Yes, I have read the report to see what the other doctors found and in examining this patient, I used all the findings of these doctors keeping them in mind,then made my own findings and conclusions.

Q You knew that Dr. Tagliagambe was the initial treating doctor, did you not?

A I knew he was the treating doctor. I don't know whether he was the initial doctor or not.

Q Were you aware that he was seen by Dr. Tagliagambe first?

A Yes.

Q That would be the initial treating doctor?

A Not necessarily. A doctor may have seen the patient on the day of the accident and there may be two doctors seen later in that day. Dr. Tagliabambe was the doctor he saw on the day of the accident and lacking any other doctor's reports on the same day, I assume he was the initial treating doctor.

Q Did you know that Dr. Tagliagambe noticed a sprain?

A Yes. I am looking at it.

Q And you didn't see fit, did you, to set forth all of the injuries that this man sustained other than an abrasion?

MR. STEARNS: Objection.

THE COURT: Sustained.

Q Did you see fit to set forth all of the man's injuries other than the word abrasion?

MR. STEARNS: Objection.

THE COURT: Sustained.

Q Did you set forth all of the man's injuries other than the word abrasion?

A I don't know whether I am supposed to answer or not.

THE COURT: If you can answer the question.

Q Did you report to Mr. Stearns that the only injury the man suffered was an abrasion?

A The injury that I stated is exactly what my

secretary got from your office.

Q From my office?

A Yes, and we stated those. It was through a phone conversation. We did not have any communication from your office when the patient came over to my office.

Q Are these the notes that you have that you brought with you?

A That is my entire file.

MR. AUSLANDER: May we have this marked for identification.

(Plaintiff's Exhibit 3, marked for identification.)

Q Doctor, is there anything in these notes which indicate that my office gave you all this information on the telephone?

A Yes.

Q Where?

A It is the absence -- may I look at it?

Q Yes, sorry.

A It is the absence of any notations or any pieces of paper from your office which normally accompanies a client from your office to my office. That paper is missing and I do not know why. It was not sent with the patient. Therefore, I instructed my secretary to communicate with

your office and find out what injuries were being claimed from this patient and therefore proceed to examine the patient on that basis.

If anything is left out, it is the only information given and the patient was examined on the basis of what we got from your office plus my review of the medical file.

Q Is this some kind of system or code that you use?

A No, it is not a code. It is an ordinary practice. You will find your office when it sends a patient over to my office to be examined, they usually send him over with a piece of paper that sets forth all the injuries claimed, the complaints, the disability, how the accident happened and information of that type.

In this particular patient for some reason that I do not know the answer did not come with that paper and therefore we communicated with your office to give us that information concerning the injuries so the patient could be evaluated on that basis and what we got is what is on that paper.

Q This whole first paragraph, second paragraph, third and fourth are what you say my office dictated to your secretary over the telephone?

A It is what my secretary obtained from someone in your office that preceded my examination of Mr. Bernardini.

Q And all these reports came from my office as well?

A Those reports came from Mr. Stearns' office and I had them with me at the time.

Q You say that all we told you was that the man had an abrasion?

A That is the information that was communicated to my secretary who gave it to me.

Q In effect, that is what you are saying, all we told you, someone from my office told you that the man had an abrasion?

A There is a little bit more in our report than that but basically, that is it.

Q That is all you make mention of?

A I also stated another claim about that shoulder which your office communicated to me and I put it down also.

Q Talking about the injuries, not the symptoms.

A That next stence next to the abrasion is not a symptom. It is a statement as to the patient's shoulder and I also put that down in response to the request from your office that we include that.

Q Are you telling me, Doctor, that all my office communicated to you in reference to this man's injury was an abrasion of the right shoulder?

A I don't know how many times I am going to give you

that answer. The answer is yes, they did not communicate directly with me, it was through my secretary.

Q That is your office, let's not quibble.

A It's not a quibble. I didn't get the information.

MR. STEARNS: May we not have arguing between counsel and the witness.

THE COURT: Yes.

Sustained as to form. The jury will disregard the last answer.

Q Would it make a difference to you if you knew that the man had besides an abrasion of the right shoulder, abrasions, contusions, sprain?

A It didn't make any difference at that point --

Q Does it make a difference to you, yes or no?

MR. STEARNS: Objection.

THE COURT: Sustained.

The jury will disregard any answer that has been made. The question is objectionable, the objection has been sustained.

Q Would it make a difference to you if you knew that the man had a contusion, abrasions and sprain besides merely an abrasion?

MR. STEARNS: I object to the form of the question. What does make a difference to him mean?

Q In your examination?

THE COURT: Do you understand the question?

THE WITNESS: Yes.

THE COURT: Answer it.

A It made no difference to me whatsoever because in all the findings made by the doctors --

MR. AUSLANDER: I move to strike out everything after "because".

THE COURT: Yes.

Does it make a difference to you seems to require a yes or no answer. We will strike everything after "because."

MR. TESTA: The doctor is stating his reasons.

THE COURT: If you want to ask them, you will have that opportunity. Counsel apparently doesn't want to and therefore he has his opportunity. You may note that and ask it on your examination.

Q Doctor, it is a medical fact, is it not, that you prescribe different treatment for a person who has an abrasion as opposed to a person who has a sprain?

A An answer to that would have to be yes or no because pain is present in both situations and pain has to be treated as pain no matter what the source of that pain is.

Q So you would give him pain pills if he has pain regardless of what it emanates from, but is not your treatment

different for a sprain than for an abrasion?

MR. STEARNS: Objection.

THE COURT: Sustained.

Q Is it good medical practice to treat a man differently for a sprain than for an abrasion?

MR. TESTA: Objection. Dr. Locido is not a treating doctor. He did not treat this man for any reason.

MR. AUSLANDER: He is here as an expert.

THE COURT: Overruled. The doctor can answer it. I will accept his answer for what it is worth.

A The treatment bears many similarities and it also may have some differences and basically those differences may be time differences.

In an abrasion, the injury may resolve itself within a period of a few days. If it is just a skin scratch, if the patient has some pain about the shoulder resulting from the scratch and from any contusions of underlying tissues, the doctor may also give some physical therapy in the form of heat to relieve pain, but we also do that for abrasions if the patient complains of pain in the area.

While there are some differences, most of them are really the same type of treatment.

Q You give heat, physical therapy treatments for an abrasion?

A I said you treat the pain and heat is one of the most important things for the relief of pain and therefore we give that.

Q When is the last time that you had a patient in the office with an abrasion which you gave him six weeks of physical therapy in the form of heat treatments?

MR. STEARNS: Objection to the form of that question. That takes in so much ground that has already been heard.

THE COURT: Sustained.

Q Have you ever had a patient in your office who came in with an abrasion and that you gave him -- with pain -- and you gave him six weeks of physical therapy by heat?

MR. TESTA: Same objection?

THE COURT: You are on cross examination. I will let you ask that. The objection is overruled.

A I personally do not give any physio therapy for people that have abrasions unless there is something peculiar about the patient like low tolerance of pain. Maybe the patient needs reassurance and many patients feel that they have to have reassurance by being close to a doctor, so the giving of physical therapy, while not indicated for treating an abrasion may be indicated for some relief of pain which in turn will give the patient assurances and allow the patient

to recover much more quickly.

Q Doctor, do you agree with this medical statement that localized tenderness anywhere means a lesion of that particular region?

A I really don't know what to say. What is a lesion? A scratch is a lesion, a pain, a tumor. If a patient has pain in the area you treat the area but it is such a general statement, it is meaningless.

MR. AUSLANDER: I would ask that you direct the doctor to confine his answers --

THE COURT: He said he agrees with it. I will strike everything after that about whether or not it is meaningless. I will ask the doctor to please, to the extent you are able to do so, try to respond directly with the questions as possible.

If you don't understand them, you may say so and say you can't answer that question. Where you do respond, do the best you can.

Q Doctor, you knew, did you not that this man had problems with the acromio clavicular joint?

A May I see my report, please?

MR. STEARNS: May I note an objection to that question for the reasons stated at the side bar.

THE COURT: Overruled.

A May I ask which shoulder you are referring to?

Q Right.

A That he had a problem with the acromio clavicular joint? The patient did not convey that problem to me and neither did your office.

Q Were you aware of that from the reading of the reports prior to your examination?

A I was aware of the fact that the past history with respect to right shoulder injuries was negative. I was also aware of complaints and findings made by other doctors and when I examined this patient, I took all of these factors into consideration in examining him.

Q All I asked you, were you aware that there was treatment, complaints to that portion of the anatomy?

MR. STEARNS: I object to that for the reasons stated before.

THE COURT: You can answer the question.

Objection overruled.

A I was aware of the fact that another physician had reported some findings with respect to the right acromio clavicular joint and I also examined that area.

Q Do you agree with this medical statement, Doctor; that a sprain is an injury to a joint with possible rupture of some of the ligaments or tendons without distal

location or fracture?

MR. STEARNS: Dr. Tagliagambe described in detail --

THE COURT: Do you have an objection?

MR. STEARNS: Yes.

THE COURT: Sustained.

Q Doctor, what is your definition of a sprain?

A A sprain is a temporary stretching of ligaments on or about a joint, in this case let's say an ankle or a shoulder and immediately after the insult that produced this temporary stretching is over, there may be a mild degree of swelling which quickly resolves then the joint returns to its former state without any apparent defect.

It's a temporary disabling condition.

Q Do you disagree with this medical definition, that a sprain is an injury to a joint with possible rupture of some the ligaments or tendons?

MR. STEARNS: Again I object to that in view of the testimony by the treating doctor. That is an abominable question.

THE COURT: Sustained.

Don't use that word again. Improper" is the word to use here.

Q Are you telling us that in your medical practice, you have never had patients with sprains that have

continued with symptomology of pain?

A For how long a period of time, a week, ten days?

Q A year, two years.

A No. In a sprain you do not have a situation like that unless you have repeated episodes of sprains in the same area for some defect that the patient may have in that particular joint. A sprain doesn't last that long.

Q Can the results of the sprain lead to further injury like a tearing of the ligaments or tendons?

MR. STEARNS: Objection. There is no such evidence. It is totally irrelevant.

THE COURT: Sustained.

Q Doctor, you are not an orthopedic specialist, are you?

A No.

Q An orthopedic specialist is a doctor who specializes, does he not, with injuries to the bones and muscles?

A He is.

Q You told Mr. Stearns, I believe, in answer to his question that when the man came into your office, he had no complaints of pain?

A You didn't quite understand what I said.

Before I examined the patient, I asked him if he had any complaints and he told me that once in a while, and if you read the way I wrote it down, it is exactly what I said, he had some pain over the deltoid area which I think he said comes on in the morning and whatever else is said there.

May I have the rest of that sentence?

Q I didn't ask you--

A I am trying to answer but I don't have my report with me, therefore I can't complete my answer.

Q You mean just asking you if you told Mr. Stearns in answer to his question, that the man looked healthy, was not in pain, had no complaints of pain?

A The patient had no pain and when I examined him he had no pain. Then I asked him when you do get the pain --

MR. AUSLANDER: Your Honor, I would ask that you direct the doctor to stop going into these long answers. He is not in court for the first time.

THE COURT: All right.

Doctor, try to answer the questions to the best of your ability.

Proceed, Mr. Auslander.

Q Did you say that the man indicated he had pain in the deltoid muscle area?

A He did not indicate he had pain in the deltoid area when I examined him.

Q Doctor, did you say in your report,at the present time the patient indicates an occasional on and off pain in the right deltoid region?

A That is only part of a sentence. Read the whole sentence and see what I really did say.

Q But there are no anatomical defects involving the shoulder mechanism presently.

A I said more than that.

Q And there is a full range of painless motion.

A That is what I said.

Q Did you also say that at the present time the patient indicates an occasional on and off pain involving the right deltoid region?

A That is exactly what I did say.

Q So he indicated to you that he had pain in the right deltoid region, he indicated that to you?

A On occasions. He did not have it at that time.

Q All right, on occasions. Is it true that the Deltoid muscle originates at the latter third of the clavicle, the lateral border of the acromium process?

A Yes.

Q And that would be at on or about the acromio clavicular joint, is that not so?

A Right.

Q Doctor, are you familiar with the medical phenomenon that after an injury to a joint there will be residual effects on temperature and climatic changes?

MR. STEARNS: I will object to that.

MR. TESTA: I don't think this is the proper way to cross examine a doctor. If he has a medical doctor and wants to ask the doctor if he recollects it --

THE COURT: Sustained as to form.

Q Doctor, in your experience and medical background, have you not bee faced with patients complaining to you that in weather change, a portion of his body hurts him as to some previous injury?

A It is so for some patients.

Q Doctor, haven't you in your own practice had patients who had been injured and subsequently upon use of that portion of the body, arduous work, that area will have pain?

A In the immediate period after the accident, that is absolutely true, but after a significant amount of time has elpased, that is no longer true unless you add another

injury to it.

Q Doctor, there was no indication in any of the reports that you looked at that this man was faking his injury, was there?

A No. Mr. Bernardini was very honest. He cooperated very nicely and we had an excellent doctor-patient relationship in not the true sense of the word since I was not his treating doctor, but I was satisfied with his cooperation and I was satisfied with the physical findings and my conclusions.

MR. AUSLANDER: That is all.

CROSS EXAMINATION

BY MR. STEARNS:

Q Doctor, were your physical findings that there were no physical findings of any injury?

MR. AUSLANDER: Object to the form of that question.

THE COURT: Sustained.

Q Did you find any evidence of injuries?

A There was none whatever.

MR. AUSLANDER: Object to the form of the question.

THE COURT: It has been asked before, answered before. The answer is before the jury.

If you see counsel rising, don't answer the question until he has had a chance to articulate his objection.

Q Where in the shoulder is the acromio clavicular joint?

A That is the outermost portion of the shoulder, approximately where my index finger is pointing.

Q In your examination, you were asking Mr. Bernardini to go through the various ranges of motion, that would indicate there was any problem in --

A Excuse me.

Q In your physical examination of this patient going through the various ranges of motion, would it have demonstrated any problem with this joint?

MR. AUSLANDER: Objection to the form.

THE COURT: Sustained as to form.

Q Did you find anything wrong with the acromio clavicular joint of Mr. Bernardini?

A Nothing wrong with the entire shoulder including the acromio clavicular joint.

CROSS EXAMINATION

BY MR. TESTA:

Q You had him go through these various motions of circumduction, abduction, internal and external rotation?

A Yes.

Q Was he able to do all those things?

A He did those by himself and this is known as active motion and I also placed him through passive motion which means that I also did it, so both the active and the passive movements of the right shoulder were normal.

Q He had full range of motion when he did these various maneuvers with his arm, is that not so?

A Yes.

Q Mr. Auslander read a sentence from your report and he asked you whether you said at the present time that the patient indicates an occasional on and off pain involving the right deltoid region. That was only part of the sentence, wasn't it, Doctor?

A Yes.

Q There is more to it?

A Yes.

Q Does it say there are no anatomical defects involving the right shoulder mechanism?

A Yes.

Q And there was full range of motion?

A Yes.

Q That is what you found?

A Yes.

Q Did you also find no evidence of any apparent defect?

A That is correct, too.

Q And you found no disability?

A That is right.

Q Was it your conclusion that he was capable of indulging in unrestricted activities?

A Yes.

RECROSS EXAMINATION

BY MR. AUSLANDER:

Q A man can engage in activity even though he has pain?

A To some extent. If the pain is not a disabling type of pain.

Q Many people work with pain, don't they?

A We all do from time to time.

MR. TESTA: I will object to that.

THE COURT: Overruled.

Anything else?

You may step down.

(Witness excused.)

THE COURT: Mr. Stearns?

MR. STEARNS: Your Honor, I believe I have mentioned and asked judicial notice of certain matters in

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the regulations. With that understanding, the defendant would rest.

THE COURT: Yes. The three sections to which counsel have adverted will be given by the Court to the jury in its charge. The Court will instruct the jury relative to the matter of its taking judicial notice of those things and I will instruct the jury in my charge.

MR. STEARNS: Defendant rests.

MR. TESTA: Third party defendant rests.

MR. AUSLANDER: Plaintiff rests.

THE COURT: Ladies and gentlemen of the jury, we have now completed the taking of testimony. At this point there are certain legal matters which the Court must take up with counsel. I would do that and I will estimate that would probably take us 15 minutes. You may retire to your jury room in the meantime.

Following the recess when you return to the courtroom, the next step in the trial is that you will hear closing arguments.

I will see how the arguments go in point of time and we will do one of two things partly depending on your own disposition in this matter.

Following the closing arguments, if it appears at that time to be about lunchtime I will send you out on

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your own.

If you feel you wish to stay through my charge, which I will discuss with you after you heard the closing arguments, we would then have the case presented to you and I would send you out with the marshal and you will be the guests of the Government for lunch.

It may be that the hour will get late and this would prove to be too late so I think we have to take this one step at a time.

I will now take care of certain legal matters outside the presence of the jury, then you will return to hear the closing arguments of the three attorneys.

At this point I would ask the jurors not to discuss the case in the jury room even though you have not heard all the evidence because the case hasn't been given to you for your deliberation.

In addition, please continue to keep an open mind until the case is presented to you sometime in the afternoon for your deliberations. If you would retire to the jury room, we will be about 15 minutes.

(Jury leaves courtroom.)

THE COURT: The jury having retired, the Court will now hear the motions which counsel wish to present. Following that I will give you my rulings on your requests

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for instructions and will inform you of my charge.

MR. STEARNS: The defendant respectfully submits three additional requests for charge which became evident after the testimony of my Captain Wheeler and one is a very recent case of which I was not aware at the time.

The third one has to do with the safety and health regulations.

At this time the defendant also moves for a directed verdict --

MR. AUSLANDER: Before you do that, I would like to make a motion and I think I am first.

First of all, your Honor, I move to dismiss the third party defendants' counterclaim against the plaintiff. There are already two cases that have been decided by this Court of Appeals which in fact have involved Mr. Testa's own office wherein the counterclaim was dismissed both at the trial term and upheld on appeal certiorari denied in fact in one of the cases. I cite to your Honor the case of McCauley against Dennocks, 332 Fed 2d 656 and McLaughlin against Trelborg, 408 Fed 2d 1334 and certiorari was denied by the Supreme Court, I don't have that citation.

MR. TESTA: If your Honor please, as far as those cases are concerned, it may very well be that the counterclaim of the third party defendant as against the

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plaintiff was dismissed in those cases but I don't think it is established as a matter of law it should be dismissed in all cases.

The theory of a counterclaim is, if he plaintiff by some act casts employer in liability, we have a counterclaim over as against him and I don't think this has been established as a matter of law for all times by the Supreme Court of the United States.

THE COURT: I wouldn't think it has but in the context of this case and the proof as I have it before me in this case relating back to the evidence which has been presented, the Court will dismiss the countercalim of the third party defendant against the plaintiff.

Do you have any other motion?

MR. AUSLANDER: No other motion. I have another request also --

THE COURT: Stand up, please.

MR. AUSLANDER: I have another request for charge which I was unable to get typed up so far as all our secretarial staff was off yesterday and I was doing some research and I printed it up in longhand if the Court will take it.

THE COURT: I will take anything counsel has. I have it now.

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I will proceed to hear motions by counsel for defendant.

MR. STEARNS: Your Honor, on behalf of defendant, I move for a directed verdict dismissing the complaint on the grounds that there has been no credible evidence that the so-called acts complained of by plaintiff, one, either occurred or two, occurred through any negligence or unseaworthiness on the part of the defendant.

In this case, plaintiff has treated us to a description of an accident which is inherently improbable and physically impossible. He is claiming an injury to the top of his shoulder which couldn't have happened the way he describes.

He says this happened by striking it against the coaming which is to his left. He claims a right shoulder injury. That together with the contradictions of his testimony would make, I think, his entire testimony totally unworthy of belief and not such evidence as would be permitted to go to this injury.

However, in the alternative, and assuming that the injury does give some credence to the claim of accident and the claim of accident occurring in the manner that he claims, assuming I can personally understand the manner in which the accident happened, I think either a description

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or indication or tendency to show the cause of his accident involves necessarily contributory negligence on the part of the plaintiff. Contributory negligence on the part of plaintiff is, of course, a breach of warranty of workmanlike service on the part of his employer.

I would ask if the Court or the jury believes that the accident happened in the manner and for the reasons claimed by plaintiff, that the jury be instructed to enter judgment for the defendant against the third party defendant.

I think this is a clear case of a situation where if plaintiff is believed, and as I say the whole story I think is improbable, the belief by the jury of his word carries, brings on its own accord brings with it the necessary implication that there has been a breach of warrant by the third party defendant.

In the hypothetical, I would ask for a directed verdict against the third party defendant.

THE COURT: Mr. Testa?

MR. TESTA: If your Honor please, I would join in that part of the defendant's motion whereby the defendant is seeking a directed verdict and is moving to dismiss the complaint with respect to negligence and unseaworthiness, not for the grounds stated by Mr. Stearns, but insofar as negligence is concerned, there is no proof in this case

of any notice to the shipowner of any defective condition. There is no proof of notice of the presence of, alleged presence of oil and grease on the deck.

There is no proof of notice of any defective condition and absent notice which is a prerequisite to a negligent cause of action, there is a failure of proof so I move to dismiss the negligence claim for that reason.

As far as seaworthiness is concerned, there is no proof of a defective condition as such in the record.

The mere fact that a walkway was there without any testimony that this walkway constituted a dangerous or defective or unsafe condition does not make the vessel unseaworthy.

I would join in the defendant's motion for a directed verdict to dismiss the complaint, both with respect to negligence and unseaworthiness.

I would move on behalf of the third party defendant to dismiss the third party complaint on the similar grounds because there is no proof in this record of any notice to the stevedores of any presence of oil and grease on this deck and again, absent notice of this, the defendant wouldn't have had time to do anything to do about it.

As far as contributory negligence, there is

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none. The plaintiff testified he heard the cracking sound of a boom and looked up and never saw the grease until too late.

He said he never saw that grease until it was too late to do anything about it, then he tried to tiptoe through it and was unable to do that.

We move to dismiss the third party complaint on the grounds that there is no proof on the ground -- especially third party defendant stevedore-and no proof whatsoever of any unworkmanlike performance by the stevedore and there is no basis for your Honor directing the jury to bring back a verdict on the question of indemnity. This is a question of fact for the jury to decide and if the jury is going to accept Mr. Bernardini's story, it would be a question of fact for the jury to decide whether the shipowner is entitled to indemnity, particularly in view of Captain Stahl's testimony that it was his obligation and duty to do something about the condition of that deck that he was responsible for the safety conditions aboard the ship and he was right there all the time and didn't see any oil and grease and didn't see anything unusual or out of the ordinary about the pallet walkway.

I would say that there is no basis for your Honor

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to direct a verdict in any event with regard to any of the issues in this complaint and if your Honor decides to let it go to the jury, then the entire case should go to the jury, but is that the complaint should be dismissed in the first instance for the reasons stated and the third party complaint should also be dismissed for the reasons stated.

MR. STEARNS: May I just add that I join in Mr. Testa's statement that there is no legal proof, notice, and no proof of an unsafe condition so even though the jury may believe an accident happened, there is still no testimony that would carry the happening of the accident into a liability situation.

In addition, as far as the claim over against the third party defendant is concerned, I commented on contributory negligence. I would also now say that an alternate basis for belief asked for in the motion of course is the safety and health regulations.

THE COURT: The Court reserves decision on the defendant and third party defendant's respective motions.

Turning now to the requests to charge, the Court rules as follows:

First as to the plaintiff's original requests to charge, the Court will charge in substance requests I through IV and VII through IX.

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The Court declines to charge V and VI except that the Court will incorporate in its charge the third paragraph of VI bases its charge there on Provenza versus Merge Sportlines Inc., 324 Fed. 2nd 664, Fifth Circuit, 1964, I believe.

MR. TESTA: I would respectfully except to that.

MR. STEARNS: I would respectfully except to that especially on the Albanese case which is to the contrary.

THE COURT: The Court declines to charge either of the items requested on the plaintiff's second request to charge which was handed up this morning.

Turning now to the defendants' initial --

MR. TESTA: For the record, I don't know what the additional request to charge was.

MR. STEARNS: It has been denied.

THE COURT: I am not going to charge it. It is here and it will be filed and it is on a sheet of yellow paper and I decline to charge either of those requests.

MR. AUSLANDER: May I make my exception known.

THE COURT: You have your exception.

Turning now to the defendants' preliminary request to charge which were handed up as I recall it on Friday, the Court will charge as follows:

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The Court will charge numbers 12 and 16. It will charge in substance numbers 1, 2, 4 through 7, 10, 11, 13 through 15, 17, 19, 20, 22, 23, 26 and 27.

The Court refuses to charge requests numbers 3, 8, 9, 18, 21, 24, 25 and 28.

MR. TESTA: May I have a moment to see what exceptions I want to take in connection with that?

MR. STEARNS: Do I understand that number 3 has been refused?

THE COURT: Yes.

MR. STEARNS: I would except to that.

THE COURT: You have your exception.

MR. TESTA: If your Honor please, I would like to take exception to your Honor's indication that you intend to charge number 19 as a matter of law, that the third party --

THE COURT: I do not intend to charge that in hac vice but it will appear in substance. I don't think I used the words as a matter of law.

When you listen to my charge, the reason is substance, I do not recall specifically saying as a matter of law and would not charge that way.

MR. TESTA: Since I have to take exceptions at this time, I would like to do that.

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THE COURT: You have your exception.

That may be cured by my charge.

MR. TESTA: I would like to take exception to request number 20.

THE COURT: In Substance?

MR. TESTA: There is no indication we were using any ship's equipment.

MR. STEARNS: I would also ask that the Court indicate to the jury ship's equipment including the decks.

MR. TESTA: I have an exception to number 20.

I take exception to your Honor's indication you are not going to charge 22.

THE COURT: I will charge in substance.

MR. TESTA: Also 23.

THE COURT: The same.

I would take exception to 26.

THE COURT: That would be charged in substance.

MR. TESTA: Also 27.

THE COURT: The same.

MR. STEARNS: For the record, I would object to the refusal to charge request number 3, 9, 19, 21, 24, 25, 28. The Court has indicated it would refuse to charge.

THE COURT: Turning now to defendant, third party defendant additional request to charge, I will charge

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number 1. I will charge item 3 in substance and I refuse to charge item 2.

MR. TESTA: I didn't hear what you said.

THE COURT: Relative to these additional requests to charge which counsel for the defendant handed up a few moments ago, I will charge item 1. I refuse to charge item 2 and I will charge item 3 in substance.

MR. TESTA: I would take exception to charging number 3.

THE COURT: I don't charge it in those words and you listen carefully when I do charge.

MR. AUSLANDER: I take exception to number 1 unless you are going to charge it in substance in those words.

THE COURT: I will leave out the words "of slipperiness" and I will charge a longshoreman is not entitled to a deck free of all grease and unseaworthiness exists if the deck is reasonably no longer fit for its intended use.

You may have your exception.

MR. AUSLANDER: I take exception to that. He is entitled to an area that is free from any slippery substances, whether it be grease, oil or however you want to denominate it.

THE COURT: I remember reading the Rice case when it came down. That was Judge Carter's case, relative to the

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matter of a ladder and I think handling the matter in the way I indicated, is in accord with that recent decision of the Second Circuit.

You have your exception.

MR. AUSLANDER: Will you be reading to the jury and charging so far as the regulations are concerned, 1504.91 subdivisions A,B and C?

THE COURT: You didn't ask me for B but I will read it if you want.

MR. AUSLANDER: B as well, please.

THE COURT: Since you want it, you will have it. I will check that off as well.

MR. TESTA: If your Honor please, I call the Court's attention to 1504.2, scope and responsibility, subdivision B.

THE COURT: Yes.

MR. STEARNS: Your Honor, if I have not said this, I except to refusal to charge number 2.

THE COURT: You have your exception.

I will be putting in 1504.91 A, B and C which has been requested by the plaintiff and 1504.2 B which has been requested by the third party defendant.

MR. AUSLANDER: Your Honor, you have my only copy -- which one again is that?

THE COURT: The one they have requested, that Mr.

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Testa has requested is found at page 2 and it reads, "It is not the intent of the regulations of this part to place additional" -- I will read that.

MR. AUSLANDER: Are you going to charge, however, that although this reads as it is stated that a breach of these regulations, a violation of these regulations would constitute negligence and unseaworthiness as set forth in the Provenza case.

THE COURT: I indicated despite the objection of your proponents that I am going to charge Provenza, yes.

MR. TESTA: I also assume you are going to submit special questions to the jury.

THE COURT: I am. There will be eight questions which we will get to in a few moments.

I think we have completed the requests which have been presented by plaintiff and by the defendant.

Turning now to the request to charge of the third party defendant.

I will charge in substance requests 1, 4 through 10, 14 and 28 through 32.

I refuse to charge request 2, 3, 11 and 13.

11 through 13, 15 to 27 and 33 through 40.

MR. TESTA: If your Honor please, I would like to take exception to your Honor's refusal to charge the

third party defendant's requests 33 through 40. This has a definite bearing upon the third party action.

THE COURT: You will hear my charge on the third party action and you may find much of what you requested at least in substance, but I am noting for the record at this point I am refusing those requests.

MR. TESTA: That would be 33 right through to the end, your Honor?

THE COURT: Yes.

MR. TESTA: I would like to take exception to each and every refusal of your Honor to charge with respect to third party defendant's requests 33 through 40.

THE COURT: You have your exception.

MR. TESTA: I would take exception to your Honor's refusal to charge number 2 and humber 3 of the third party defendant's request to charge.

I believe you said you were going to charge 4 through 11.

THE COURT: 4 through 10, in substance.

MR. TESTA: I would take exception to your Honor's refusal to charge number 11 and I am not sure what the rulings were after that.

THE COURT: I am refusing to charge 11 through 13.

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MR. TESTA: I would except to that.

THE COURT: And 15 through 27, and you have already covered 33 through 40.

MR. TESTA: 15 through 27, I also except to each one of your Honor's refusal to charge.

THE COURT: Turning now to the third party defendant's additional requests to charge handed up on Friday, I will charge 12. I will charge in substance 4 and 14, I refused to charge 1 through 3, 5 and 11 and 13.

MR. TESTA: I take exception to your Honor's refusal to charge 1 through 3, 5 through 11 and 13.

THE COURT: That concludes the Court's ruling on the requests to charge.

I will proceed to inform counsel as to the substance of the charge I propose to deliver.

MR. STEARNS: As I understand, the original third party requests number 32 is going to be charged in substance. I would object to the charging of 32 in substance and of the additional requests, 6. If the Court indicated it would charge that I may be in error.

THE COURT: 6 has been refused.

MR. STEARNS: 13 is not charged as well.

THE COURT: That is correct. 12 will be charged.

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MR. STEARNS: 14 has been refused.

THE COURT: That will be charged in substance.

I would indicate that if they don't believe it is unseaworthy, it is not a question of remedy, it's a question of plaintiff's right to recover in the first instance.

THE COURT: Turning now to the charge which I propose to give, the beginning of the charge will be a general discussion with the jury relative to their duties to determine fact issues, matters which some of you who have appeared before me have heard. I indicate to them that any comments which I have made should be put to the side.

I take no position in the case, I am here to instruct the jury on the law, that is my function.

I indicate to them if they want any testimony, they may get it. If they want any exhibits, they may get them.

Getting now into the substance of the charge, I indicate essentially there are two cases, the action brought by Frank Bernardini against the shipowner and the action by the shipowner against ITO.

I indicate the principles of law governing the respected cases are different. I first discuss the initial proceeding plaintiff against shipowner. I discuss warranty of seaworthiness and I indicate imposes on the owner of

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the vessel the duty to supply shipworkers with a seaworthy vessel, one that is fit for its indented purpose.

I indicate it is the shipowner's duty to supply a seaworthy vessel. That extends to furnishing appurtenances fit for their intended use.

I indicate that the plaintiff though not a sailor, in fact a longshoreman is entitled to the same protection as would be afforded a member of the ship's crew.

I indicate that the shipowner's duty to provide a seaworthy vessel was completely independent and separate from whatever duty his employer ITO owed to him.

I indicate that the shipowner's duty to supply a seaworthy vessel is absolute and that the duty is imposed even though the shipowner may have been free from court, whether or not its officers knew of the alleged unseawothy condition. Liability for unseaworthy condition I say does not depend upon negligence or blame.

I then,after a brief discussion of seaworthiness, get to the point where I say it is the fact of seaworthiness if you should find which renders the ship unreliable is approximately a seaman or man working aboard ship sustains injury.

I discuss proximate cause and define what I consider it to be in the usual way.

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I do indicate that relative to seaworthiness, this does not mean that the shipowner was supposed to furnish an accident-free vessel. In determining seaworthy, the standard to be applied is not absolute perfection but reasonable fitness.

I discuss a seaworthy vessel with appliances reasonably fit for their intended use or purpose on which normal operations are in progress and during the course of those operations a previously fit vessel or appliances rendered unsafe because of the negligent act of such person and state in such an instance if the negligent act itself is in process and not yet ripened into an unseaworthy condition, the act during its commission is referred to as operational negligence and in these circumstances, the shipowner would not be liable.

In other words, I say, if the defect arose as a momentary stop or failure of the progress of work aboard an otherwise seaworthy vessel and was an isolated incident in the course of continuous operation, then a seaworthy condition had not yet resulted, the shipowner is not lable.

I go on to discuss an act resulting in a condition of unseaworthiness. If you reach the point of unseaworthiness there is liability. If the act falls short of creating a condition at the time of the accident, it is not.

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I suggest that the jury should bear in mind at all times unseaworthiness is a condition and how the condition came into view whether by negligence or otherwise -- I then would proceed to indicate as plaintiff had requested that the plaintiff claims damages for personal injuries suffered as a proximate result of the unseaworthiness of the vessel, general working and/or walking area of the deck in particular.

I set forth very briefly the plaintiff's contentions as I have them from my notes. I indicate the testimony of the plaintiff. I briefly mention Mr. Graziano and Dr. Tagliagambe and the testimony of Drs. Graubard and Lodico.

I then indicate that the parties disagree as to whether the accident happened and as to the casue of the accident. I then turn to the shipowner's testimony, that is, Mr. Stahl and what he had to say. I then proceed to the plaintiff's request number 2 where I indicate that he alleges that the deckway where he was walking at the time of the accident which was a working or walking area was in an unseaworthy condition due to grease or oil on its surface making it slippery to walk on and encumbered with tripping hazards and that these conditions were present at the time of the accident and according to the

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plaintiff had been allowed to remain for some time.

I go on saying that the shipowner disputes this, that there was no accident and further contending assuming there was an accident and there was grease or oil on the deck, this was a temporary condition and did not of itself render the Svensksund unseaworthy.

It is at this point I will mention as has been requested by defendant and third party defendant that a longshoreman is not entitled to a deck free of all grease. Unseaworthiness is when the grease or oil creates such a condition on the deck that it is not reasonably fit for its intended use.

I go on to say if the defendant contends if they find it is an accident and the vessel was seaworthy, that Mr. Bernardini is not wholly responsible, that he contributed to the occurrence by his negligent conduct by not looking where he was walking and the damages should be reduced accordingly.

I then turn to the testimony of Captain Wheeler and his opinion. I indicate relative to experts that they may be called and in evaluating their testimony, the jury should take into consideration. experience, training, facts, available to the experts and they may reject the expert's opinion, they are not required to accept it.

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The opinion is given to assist the jury in reaching a proper conclusion and is entitled to such weight as the jury find the expert's qualification in his view warrants.

I then discuss the fact that Mr. Bernardini having made a charge of unseaworthiness has the burden of proof; also show that it was proximately caused by a fair preponderance of the evidence.

If they find a fair preponderance of evidence, they should use a scale approach.

I have indicated that counsel reviewed the evidence. I am not going to summarize at length the testimony of witness. I tell the jury to consider all the evidence. If they find the plaintiff has sustained his burden of proof and that a condition of unseaworthiness existed by virtue of grease and oil on the deck and the walkway obstructed by the pallets on the deck, the plaintiff is entitled to recover.

However, if they find that the pallets were installed in a workmanlike manner and there was no grease or oil, and that if there was oil and grease, the presence presented a temporary condition and the accident was due solely to Mr. Bernardini's own negligence.

I go further. However, it does not relieve him of his duty to exercise reasonable care for his own

safety.

Then I discuss the general doctrine of reduction of damages,then pass on to the negligence claim and I explain the doctrine of negligence that is a breach of duty and the failure of negligence being the failure to use ordinary and reasonable care under the given circumstances.

I indicate the plaintiff has the burden of proof and I indicate generally the same evidence is relied on in both areas.

I indicate that plaintiff urges that permitting grease and oil to remain on the deck and pallets to reamin on the deck makes the deck unreasonable to walk on and the ship's officers should have known and removed the grease and oil, provided a walkway past the pallets and failure to do so is the plaintiff's contention is negligence.

In violation of the defendant's duty to supply Mr. Bernardini with a reasonably safe place to work.

I indicate that the shipowner denies it was negligence in any respect. If the jury so finds, their verdict should be for the shipowner.

I indicate the plaintiff relies on certain regulations promulgated by the Secretary of Labor. I say the Court will take judicial notice of these and the first of

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them is 1504.91 A, B and C, I would read those sections and indicate that the defendant has requested the Court to take judicial notice of 1504.2 B which reads as follows, and then I will read that.

I will indicate if they find that the first three regulations or any one of them is violated by the stevedore, their violation would render the Svensksund unseaworthy and if such unseaworthiness was the proximate case of plaintiff's injury, it would also render the defendant shipowner liable.

If they should find that the third party defendant ITO violated the regulations, such conduct by ITO could also be found by you to constitute negligence. Here I am working from Provenza as I indicated before. If in turn this negligent conduct of the stevedore were known or by the exercise of reasonable care should have been known to the shipowner and such negligence was the proximate cause of plaintiff's injury, the shipowner then would be liable to plaintiff on the ground of negligence, which if they find would requirea recovery or if there were contributory negligence.

Of course I say if they find that Mr. Bernardini did not slip on the oil or grease, then their verdict should be in favor of the defendant.

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Then I turn to the matter of damages. I indicate that this does not mean that they should find them, but I have to charge and am required to charge on the law. I indicate the burden of proof being on the plaintiff. I discuss briefly to testimony relative to the injury to Mr. Bernardini's right shoulder and arm, the testimony of Dr. Graubard, the fact that this is disputed by Drs. Tagliagambe and Lodico first as I say, the defendant and third party defendant dispute that the plaintiff was either injured or suffered permanent injury and I indicate that the doctor disputes there was any permanent injury.

If there was any injury at all, it is not as serious as the plaintiff says it was.

I will indicate as is -- the testimony I wouldn't discuss in detail. I will indicate the parties have stipulated, as of the date of the accident, Mr. Bernardini had a life expectancy of 28 years and a work expectancy of 22 years.

The reasons for this, but basically the matter of damages if they are permanent they should make an allowance in there such as they believe were appropriate relative to life expectancy and on loss of earnings relative to work expectancy which I indicate is from up to the age of 65. He was about 43 at the time of the accident so we are

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talking there about 22 years.

I indicate if the jury gets to this point, they are to award a sum of money which is fair and reasonable compensation to the plaintiff if they find he sustained an injury aboard the Svensksund on October 21, 1969.

I discuss the contentions as to how long he said he was unable to work.

I indicate that the plaintiff may only recover wages lost by being disabled. They must weigh the testimony of the plaintiff and of the doctors who testify as well as the exhibits regarding his ability to work.

We go into the conditions made by the third party defendant that he should have returned to work earlier and I indicate it is the jury's recollection in this regard and their finding which would be determinative of the Government.

I discuss briefly the matter of the plaintiff's alleged contribution to the accident indicating again that he was under a duty to exercise reasonable care for his own safety and to take such measures and action for his own safety as the jury would expect any reasonably prudent person to take.

I discuss the proportion of reduction that the jury could make in damages if they found contributory damages, if they found contributory negligence.

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I indicate the burden of contributory negligence, the burden is on the shipowner too by a fair preponderance of the evidence. I give an example of how they may work that out. Of course I say if they find that Mr. Bernardini was not negligent, they should not reduce the award. They are not to add to award any taxes because this is not taxable income.

I then turn to the third party case and I indicate what the shipowner's position is if it is called upon to pay damages for the plaintiff, this causes a breach of warrant by the third party defendant ITO which in performing maritime services on the ship warranted to the shipowner its work would be performed in a safe, proper and workmanlike manner.

I say that if this warrantywas breached, if the stevedore is found to have failed to perform its services in a safe, proper manner, and then as a result, Mr. Bernardini did become injured, or that the shipowner contends it is entitled to recover damages from ITO for any amount it is called upon to pay Mr. Bernardini.

In other words, the shipowner is entitled to be made whole for damages ordered against it in favor of the plaintiff.

That is, if there is a breach of warranty of

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workmanlike performance, that the obligation owed by ITO to the shipowner was to perform its work with reasonable safety and in a proper and workmanlike manner. This relates not only to the handling of the cargo but also to the use of all equipment incident thereto.

The shipowner contends if it is found liable to the plaintiff, it is because ITO breached its warranty of workmanlike performance. The shipowner contends if it was due to the unsafe and improper workmanlike manner which ITO's manner performed their work. Essentially, the shipowner's claim is that ITO was negligent. ITO denies all these contentions.

I say the law does not require perfection. ITO okays the work and accordingly it urges that the shipowner is not entitled to any indemnity from it. They indicate the shipowner has the burden of having breached its warranty by a fair preponderance of the evidence.

I say that ITO's warrant of workmanlike performance required it to see that its stevedores worked under reasonably safe conditions and that the working conditions were unsafe, ITO was under a duty to discontinue operations as soon as it knew or should have known it would be unsafe to continue.

Failure to suspend operation if the jury should

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so find constitutes a breach even if the jury finds the shipowner responsible for the underlying conditions.

ITO's warranty also extended to itself.

There may be employees who were not negligent in the performance of their regular duties.

I say ordinarily if the jurors find negligence on the part of any officer of ITO or by fellow workers of Mr. Bernardini or negligence by Mr. Bernardini which acted or contributed to the accident, then they have sufficient evidence upon which to find ITO breached its warrant of workmanlike performance of the shipowner.

The failure of the shipowner to discover breach of ITO affords no defense to the shipowner's claim.

I say that if they find all the evidence that ITO violated the warrantyof workmanlike performance which casts the shipowner, the shipowner is required to recover indemnity by some action or inaction on its part handicapped ITO in performing its workmanlike job or fulfill its obligation.

I indicate to a verdict for the shipowners, there is a burden of proof by a fair preponderance of the evidence upon ITO to establish that the shipowner is guilty of such negligence barring a recovery. That is upon all the evidence if they find ITO was not responsible, it has

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sustained its burden or proof by reason of which they have awarded plaintiff a recovery against the shipowner, then the shipowner's claim for indemnity should be denied.

So, too, if ITO has carried its burden of proof to defendant the shipowner's claim likewise it will be in favor of ITO.

You decide fact issues. They are called upon to determine credibility. I discuss the matter of credibility and observation of witnesses. If any witness is found to have falsified anything at any point, they may accept or partly accept, reject in part or wholly any testimony of that witness. It is not a matter of sympathy. It is a matter of sustaining onces burden of proof.

And I indicate to the jurors that they should take their own opinions in the jury room, not discuss them with the other jurors and to return a verdict they must be unanimous.

I indicate I have prepared a form of verdict which contains eight separate questions which may be submitted to the jury which they will take into the jury room and I will proceed to read those questions to the jury and give the questions to them to take into the jury room and I will give counsel copies of the questions.

The questions which I would give to the jury are

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here. I have Xeroxed one for each of you, one set of questions,and we will ask Miss Kruger to distribute them to you.

There are eight questions.

MR. TESTA: Before we do that, your Honor, are we going to be asked with respect to additional requests or exceptions.

THE COURT: You had your opportunity to make your requests and I have ruled. At this point -- you mean after I finish my charge?

MR. TESTA: Now you have indicated what your charge is going to be.

THE COURT: And that is what it is going to be.

When I finish delivering it in the words I used to the jury, if you then wish to make any exceptions or requests, you may do so. This was given to you so you could be apprised of the manner in which I was going to approach the case so you could structure your closing arguments accordingly.

You may be permitted to make any additional requests to charge or exceptions.

MR. STEARNS: With respect to a special verdict, may I ask that the question be directed to whether or not the jury believes an accident happens. This may have

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some bearing on the third party action because it is possible that a successful defense of plaintiff's claim on legal grounds, an accident -- will have implications on a third party action by a finding by the jury whether this is a phony or not.

THE COURT: I will not change the special verdict. You have your exception. Ithink there is enough in the charge. The jury can dispose of this case very promptly if they find there is no accident.

MR. STEARNS: That is not one of the specific questions asked and I think it should be.

THE COURT: You may think so and you have your exception.

MR. TESTA: I was under the impression you were going to submit questions with respect to the action, number one first, then with respect to action number two, depending upon what the jury's finding was in action number two, but I see you have question number eight.

THE COURT: That is correct, but I did not want to have any more problems such as the ones I had in your Metistic case and I think that question which will be answered by the jury will dispose of any problems of the type which arise there.

MR. TESTA: I have no objection to that question

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being asked. I just thought it was going to be asked at a different time.

THE COURT: No. I am giving it to the jury now.

MR. TESTA: I would want a finding on that.

THE COURT: I would think you would. I don't want any more problems of the type which came up in the other case and I think the appropriate manner to do it was where I have it and when I have it.

MR. TESTA: I was only objecting to the place itself.

MR. AUSLANDER: Your Honor, I believe I overheard you say in substance that a temporary condition would not give rise to unseaworthiness which I believe if I did hear you correctly goes in the face of the Mitchell case.

THE COURT: You listen to my charge and if you wish to make any exceptions when I deliver it in hac vice, you may do so.

I think my charge comports with the law in this circuit as I understand it.

The reason I give you the substance of the charge is so you can structure your closing arguments accordingly. I will give you every opportunity in the world before the jury retires to make additional requests or exceptions.

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MR. TESTA: I would just like to ask you, are these going to be all the questions you are going to submit to the jury?

THE COURT: That is correct.

MR. TESTA: I would ask your Honor to submit a further question, did the stevedore establish his claim that by some conduct on the defendant's part, that the defendant prevented, hindered or seriously handicapped the stevedore from performing his services in a safe, workmanlike manner and that the conduct of the shipowner in this case precluded the recovery of indemnity if they find that the chief mate was there and present when this whole thing happened that he would be responsible for any oil or grease on the deck and any unsafe or dangerous condition and that such conduct on the part of the safety mate is sufficient --

MR. STEARNS: That is an absolute misstatemant of the law. The law is active hindrance. I know this was charged in the preliminary request to charge before the testimony was in. I would like to formally add that the Court withdraw its charge on active hindrance because there is absolutely no testimony from anybody in this case that could begin to make up a claim of active hindrance. It is totally misleading and I ask it be withdrawn.

THE COURT: You have your exception.

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We will take a five minute recess and we will proceed to the closing arguments.

It is now 12:35 and under the circumstances, we do want to begin these closing arguments and I have indicated to you, I believe previously, that you can anticipate having one half hour each of you which will take the closing arguments for one hour and a half.

MR. TESTA: Do I understand you are not going to submit a question to them with respect to conduct of the shipowner sufficient to preclude an indemnity?

THE COURT: I am going to submit eight questions to the jury. I believe they cover the points. I am sure each of you would like to have more but at this point, I feel that these are the elements of the case and when they are taken in conjunction with my charge, I feel the entire case will be for the jury.

MR. TESTA: Just to protect the record, I would like to take a specific exception to your Honor's refusal to charge they may take into consideration the conduct of the shipowner in this case as sufficient to preclude indemnity.

THE COURT: There is no basis in this record for that question.

MR. TESTA: There most certainly is.

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THE COURT: You have your exception.

MR. AUSLANDER: Since I will be speaking last and I will be speaking approximately if counsel go along with their half hour limits, from 1:30 to 2:00 which is rather late, the hunger pangs of the jury may take away some of the attention. I would ask respectfully that you send the jury out for lunch now for 45 minutes and that we start right afterwards.

MR. STEARNS: I have no objection to that.

THE COURT: Let's bring the jury in right now. We will send them for an hour.

MR. STEARNS: Again for the record, can I except to the form of the verdict because it does not require the jury to make a finding as to whether the accident ever happened.

THE COURT: You underestimate the intelligence of the jury.

(Jury present.)

THE COURT: Ladies and gentlemen of the jury, I think it would be physically impossible to put the case into a posture where you could have lunch as I suggested.

I have had a discussion with counsel and they feel and I would agree with their feeling in the matter that they would prefer, and I think it is preferable

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for my own point of view that I send you to lunch now, that you take your lunch, it is about 25 minutes of 1:00, that you take it now, that you return at a quarter of 2:00, then we will begin and what you can expect this afternoon is that you will hear each counsel will speak for about one half hour, then we will take a short midafternoon break, then you will hear the Court's charge which I would estimate would run somewhere in the neighborhood of 45 minutes, maybe a little bit longer. At that point the case will be given to you.

I will ask you to deliberate on the case. If you reach a verdict, fine. I will not keep you late. You are on your second week of jury service and I will then bring you in tomorrow to continue your deliberations.

I think under the circumstances, it makes a much greater degree of sense to take the break now. It will be a fairly long afternoon and I think if you go out in that hour and five or ten minutes that you have until a quarter of 2:00, kind of walk around a little bit, after you listen this afternoon, you will start your deliberations.

Don't discuss the case among yourselves. Keep an open mind on the case. Get yourself a little lunch, a lot of fresh air, maybe a little exercise and when

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you come back here at a quarter of 2:00, you be ready to go.

(Luncheon recess.)

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AFTERNOON SESSION

1:50 p.m.

(In the robing room.)

MR. AUSLANDER: In this charge requested by defendant in their additional request to charge handed up this morning, number one, where they cite Rice against Atlantic Gulf & Pacific Company, the Second Circuit case unreported --

THE COURT: It was a case involving a ladder.

MR. AUSLANDER: In the engine room where you would expect to find some oil or grease around and that is substantially the holding of the Court. We are now talking about other areas of the ship where you would not normally expect to find oil and grease on the deck and I think that this case is unique on its facts. It is sui generis and it does not apply to the case at Bar and a charge in the wording as it exists here, I believe is erroneous as a matter of law and I bring it to your attention so that asking that you reread the case and be able to then pass on my request and objection.

THE COURT: I did read the case. I read it shortly after it came down which was earlier this month and I do remember it and I remember, as I recall it, there was grease on a ladder and recall --

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MR. AUSLANDER: In the engine room and concerning a seaman.

THE COURT: A member of the crew, yes.

I am going to delete this from my charge. We do have a somewhat different situation here and I think that I will present the charge as I had originally written it over the weekend. Therefore, I will refuse to charge your additional request No. 1, Mr. Stearns. You have your exception.

MR. STEARNS: About the regulations?

THE COURT: Yes.

MR. TESTA: I would also take exception to that, your refusal to charge.

THE COURT: You each have your exceptions.

MR. STEARNS: Your Honor, the Albanese case is clear.

THE COURT: The case itself is clear. I reread it again during the luncheon recess. As a matter of fact, I have it with me here right at my elbow.

MR. TESTA: Is that the Supreme Court decision?

THE COURT: No, that is the point. I have the Second Circuit decision where they say at page 784, 346 Fed. 2d at 484 where the Second Circuit says ordinarily such regulations of stevedoring practices are not relevant

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to the issues involved in the claim against the shipowner and clearly could only confuse the issue here, and they go on to discuss the particular situation where they had a matter involving the concentration of gas on the vessel.

From that I went to the Supreme Court decision which reversed and reinstated the judges, trial judges, the trial court verdict in the case. Obviously if this was plain error and prejudicial, the charge would have been plain error pr prejudicial, the Supreme Court wouldn't have reinstated the verdict below.

I would state under the circumstances that the Supreme Court left the matter in a somewhat ambiguous state. I think after having read both of those decisions, Second Circuit and Supreme Court, having shepherdized them which I did during the luncheon recess, at the present time I am disposed toward charging Provenzo, the Fourth Circuit case.

You have objected and you have your excentions.

I think if you take the charge as I propose to give it overall, there are a number of things which balance out. The charge is explanatory and I think under the circumstances when the entire charge is presented to the jury, they will have what I believe to be a good overall idea what the law is.

I recognize your objection. Of course each of you have made your objection to my charging Provenzo.

MR. TESTA: Provenzo is not the law in this circuit.

THE COURT: I recognize what you have said.

MR. STEARNS: My experience as limited as it may be, it is uniformly held not to apply.

THE COURT: I happen to think that the majority reasoning in Provenzo, at least from my point of view, makes a lot of sense and it would seem to me that at least from the shipowner's point of view, since these regulations apply to a longshoreman, basically, that were there to be a finding here by the jury, a finding of liability, I can tell the shipowner's counsel anyway that I could only foresee indemnification for him.

As far as the third party defendant is concerned, needless to say if he violated the regulations, he shouldn't benefit from it and I just feel on balance the way it sets up it is fair and of course as I have indicated, each of you has objected and each of you has an objection.

MR. STEARNS: As I indicated in my supplemental charge No. 2. Since the regulations are mandatory and that any basis of liability established through breach on the shipowner's part of a regulation would mean conclusively

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that the shipowner is entitled to indemnity and I would ask that the jury be so charged.

THE COURT: I wouldn't charge them as a matter of law.

(In open court, jury present.)

THE COURT: I hope you enjoyed your lunch on a very lovely day. We are starting a few minutes later. There were a couple of other matters that counsel wished to take up with the Court. We disposed of those and you will now hear closing arguments.

Each of the three attorneys will be taking approximately a half hour so I ask you to sit back, listen carefully to what each counsel has to say and when we finish the three summations, we will take a short break so you can stretch and then you will return for my charge.

If you would listen closely to each counsel, give them your undivided attention, I think you are coming now to a point in the trial where it is very close to the end where you will find that a lot of things you have heard, maybe some of the points which have been made which were not meaningful to you, counsel will try to put them in a context where the case will take shape as each of them sees it and then after that I will charge you, then

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the case will be given to you for your deliberation.

Mr. Testa.

MR. TESTA: Your Honor, Mr. Auslander, Mr. Stearns, ladies and gentlemen of the jury.

We have now arrived at the point in the lawsuit which is known as the moment of truth and a lawsuit is in fact a search for the truth and that is what you ladies and gentlemen are going to have to decide, just where the truth is in this case, because there are two sharp and different and diametrically opposed versions of this case.

Of Mr. Bernardini on the one hand telling you about a boom cracking, about tiptoeing through spots of oil and grease, about slipping, twisting, tripping, falling, all kinds of situations calculated to make out a case on his behalf against the shipowner.

As I pointed out to you, he is only suing the shipowner in this case, Rederi A/B Saturnus.

There are two cases here and I will discuss them separately, and he is making these claims in Action No. 1 only against the shipowner. The shipowner denies it. Mr. Bernardini is saying in this first case that he sustained personal injuries on October 28, 1969 and he is saying that he sustained personal injuries because of some alleged negligence of the shipowner and because of some

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alleged unseaworthiness, and he has the burden of proof.

He must establish that this shipowner was negligent and that this vessel was unseaworthy and if he does, he is not entitled to anything.

By the same token, the shipowner has the burden of proof in Action No. 2 and his claims have to be established to your satisfaction in Action No. 2.

For the moment, I am just going to concentrate on Action No. 1.

You have two different stories. You have Mr. Bernardini saying the action happened in one way and you have a chief mate who came here and told you he was there and was an eye witness to the whole thing, there was no accident, there was no boom cracking, there was no oil on the deck and there was no tiptoeing ot tippy toeing as the expression was used in this courtroom.

He told you that Mr. Bernardini came aboard this ship, asked him where the ladder was, walked around to the offshore side even though the ladder was right there, came back around to the inshore side, came up to that pallet walkway, kneeled down and faked the whole thing.

That is what he told you. You have two diametrically opposing stories and you will have to decide who is telling the truth.

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How do you do that?

You saw Mr. Bernardini, you heard him testify. You have to evaluate from his testimony what he said, how he said it, whether he was truthful, forthright with you, and you also saw the chief mate Mr. Stahl testify and you have to evaluate his testimony, whether he was truthful, and forthright.

There are some other little factors that will help you make this decision. There were some reports made here. Bear in mind that Mr. Bernardini was only on this ship for five minutes. He came aboard at 8:45 in the morning. The accident happened at 8:50, so this whole thing took place in a period of five minutes. He is making a claim for damages, for personal injuries that he says he sustained to his right shoulder.

Well, maybe he did, maybe he didn't. Maybe he hurt his right shoulder some place but he didn't hurt it on this ship. Maybe he hurt it in his own house, in a bar and grill in a fight. I don't know, we don't know. But I say to you he didn't hurt his shoulder on this ship.

Mr. Bernardini was in effect an accident looking for a place to happen and he came aboard this ship with the idea in mind of finding a place on this ship where he could say an accident happened because he has had

several claims before. He knows all about accidents and injuries on ships. He knows that you can sue the shipowner if the accident happens on the ship. You can't sue the shipowner if the accident happened on a sidewalk or in a bar and grill or in your own house.

So, he comes up the gangway and there is the chief mate standing right there and he says, are you a longshoreman and the chief mate says no.

Now, he was there for the ostensible purpose of looking for a ladder to go down into the No. 4 hatch because he told you he was an extra man assigned to the gang at the No. 4 hatch, and that was the reason he was supposed to be on the ship.

I say ostensible because that is what he told you. He was looking for a ladder and here is a man who has been a longshoreman for 25 years. He comes up this gangway looking for the ladder which is right there, and in 25 years as a longshoreman, he knows a ladder when he sees one. It is also in this photograph which is Defendant's Exhibit D-1. It is marked with a little X on it It might look like a bathroom hamper or footlocker to somebody who has never been on a ship, but Mr. Bernardini has been on ships for 25 years and he knew that was the ladder right there. He was looking for the ladder.

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That was it, he found it.

The thing is, he wasn't looking for a ladder. He was looking for a place to stage this accident, to do a little play-acting as Mr. Auslander used the word, to present an accident happened as the chief mate says.

So, he went right past the ladder which was open and obviously to anyone who has been a longshoreman for 25 years and knows what an escape hatch ladder looks like. He went over to the offshore side and that might have been a good place for the accident to happen except that there was somebody over there. This is the man he asked where is the ladder and he says the man told him it was over here on the inshore side.

He already knew where that ladder was because he went past it over here, but he says he was told it was on the starboard after end which is the inshore side so he continues his voyage around and then he told you that he went behind the No. 4 hatch, and there was no question about it. I asked him, you drew this line, didn't you and he said, yes. Mr. Auslander drew the overall diagram but Mr. Bernardini drew this line, that is his line right there, right behind the No. 4 hatch, because he didn't know there would be photographs offered in evidence which are here, and I would like you to take with you, showing that

that would have been impossible.

First of all, there is a big fence here and secondly, the hatch covers fit right back into that space. When the hatch is opened up they fold back and there is no way he could have gone around the back of the hatch, but that is what he told you.

These are all things that you should take into consideration when you decide who is telling the truth and who isn't.

Just add all these things up. The ladder is right there but he goes past it. He is supposedly looking for it and he gets over to the other side and he says he went behind the No. 4 hatch which is a physical impossibility, then he went around and as the chief mate says he kneels, ane he knelt down and he says an unsafe passage, and these are words a lawyer would use, but he is right there claiming an unsafe passage, no word about oil and grease.

The chief mate was there. He did not tell the chief mate there was any oil and grease there. He didn't say anything about a cracking boom. The chief mate called the ship's foreman. He didn't tell him anything about oil and grease or a boom cracking. Then the superintendent came over, no mention to him. That is three people right there he never said a word to them about a cracking noise

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from a boom or oil and grease or tippy toes. Unsafe passage, that is all he was saying.

That is only the first three people. Then he went to the timekeeper and here is what he told the timekeeper, here is the report, it is in evidence. There is nothing in this report about a boom cracking, about oil and grease or about tippy toeing around through oil and grease.

No. 4, there are doctors he went to, Dr. Tagliagambe. He didn't tell him there was any oil and grease or cracking boom and finally Dr. Miglioto. Nothing in his report about oil and grease or cracking boom.

So, when did all this develop? Well, there came a time when Dr. Tagliagambe told him he could go back to work on November 3, 1969 and he didn't like that so he went to Mr. Adler to make a case. Mr. Adler of course is a lawyer, the same office as Mr. Auslander, and then the facts started to develop.

Why the story about the cracking boom? He is coming around the hatch, if you accept his version. He can't see anything and when the boom cracks, if you want to believe it did, then they have him looking up in the air and he can't be looking down and looking up at the same time.

Then when he looks down, here are these grease spots suddenly confronting him; whereupon he is up on his toes now doing a ballet dance, the Rudolf Nuryev of the waterfront, tippy toeing through the grease spots. Imagine him at his size and weight on his toes with his ballet slippers trying to avoid these grease spots.

Then he says he didn't avoid it, he slipped. Then he looked back afterwards and he sees the grease. What does he see, does he see toe prints? No, he sees heel prints.

Isn't that amazing. Of course there is a reason for that too, because now he is trying to establish that he is up on his toes and somebody else walked through this grease and therefore the shipowner should have known about it, they were on notice and should have done something about it.

Imagine this, this cleverly contrived story. Does Mr. Bernardini look clever enough to contrive that whole story? Would he think about cracking booms and tippy toeing through grease spots so he is up on his toes so he can tell you about heel marks later on? He didn't tell you what these heel marks said, whether they said O'Sullivans heel or had some Swedish name on it or any other kind of a name but here is this whole fabricated

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story about being up on your toes and somebody else being down on their heels.

These are all things that I want you to take into consideration. See if all this adds up to your scene.

He then said that he slipped and twisted and tripped and supposedly hit his right shoulder on the hatch coaming when he is walking in a direction that would have his left shoulder to the hatch coaming, assuming this railing before you ladies and gentlemen is the hatch coaming.

Nevertheless, he managed to slip, twist, fall and still hit his right shoulder, pivot around and hit his right shoulder.

However, the chief mate claims that he complained of pain in his left shoulder. This is another little thing that is in evidence.

Apparently for no reason the longshoreman fell and afterwards he made complaints about great pain in the left shoulder. An eye witness to everything was Chief Mate Stahl to whom the whole thing seemed to be mere acting.

He then goes to Dr. Tagliagambe and as I said before, after six days, Dr. Tagliagambe told him he could go back to work,but he wasn't happy with that.

Now, he did go to the Department of Labor and there

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is a report here indicating that he might need some further treatment and did get some further treatment. More than that, he went to Dr. Graubard.

You saw Dr. Graubard here. Here is a man who examines longshoremen for Mr. Auslander's office. He said so, three or four hundred times a year, just for this one office, and a thousand times a year for all plaintiffs' offices who represent men like Mr. Bernardini. A thousand times a year for 35 years, 35,000 such examinations he made for the purpose of finding defects, and he found it. That is what he was supposed to do.

What did he tell us, 17 and a half per cent disability to the shoulder. Only two weeks ago he testified in a case where I was involved, Mr. Auslander was involved and a lawyer put his hand in front of him and in five seconds he said you have a 17 and a half per cent disability.

MR. AUSLANDER: I will object to any further summation on this point on something that might or might not have been testified.

MR. TESTA: The doctor testified it happened.

THE COURT: It is the jury's recollection that governs but it is my recollection that there were a series of questions put to Dr. Graubard by counsel

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relative to a prior trial during which a lawyer put up his hand.

I will tell the jury right now that it is your recollection of what Dr. Graubard said during the course of his questions and answers which will govern and if you have a vague recollection on this particular subject and you wish testimony read back, you may have it read back.

The lawyers are giving you their recollection of the testimony. The true testimony may be what they recall but it certainly can be found in your minds, in your recollection or in the court reporter's notes and he will be available to you should you have any questions.

We will leave this question for you and your recollection and ultimately for your deliberations.

MR. TESTA: It is my recollection that I asked Dr. Graubard that question and he said yes, he looked at Mr. Kimball's hand for five seconds and he told him he had a 17 and a half per cent disability, in five seconds. It is his favorite number, 17 and a half per cent.

In this case it was the shoulder, not the hand, but you can evaluate Dr. Graubard's testimony and I say to you it should be disregarded completely. You heard Dr. Graubard and you heard Dr. Lodico and this man was able to go back to work on November 3rd for whatever

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injuries he may have sustained and again I say to you he didn't sustain any injury on this ship.

He told you he went back to work, he has worked ever since and he is working as a longshoreman and that he had three other accidents and bear that in mind because you will hear the story how he lost time, but from three other accidents, not this one.

So, I say to you there was no accident. Adding up all these little factors in this case, the Chief Mate Stahl told you what happened. That is the truth of the matter. There was no accident. If you believe Mr. Stahl, then you should turn Mr. Bernardini out of court because nothing happened. He tried to fake an accident to collect money that he is not entitled to.

There are two cases here and I have to devote some time to this because my client was brought into this case by the shipowner and the shipowner is taking, in my opinion, a very inconsistent and incongruous opinion. On the one hand, the shipowner says there was no accident, the chief mate said so. We are not negligent. The ship was not unseaworthy. We are not responsible for any accident, but in spite of all that, they turn around and bring my client the stevedore into this case --

MR. STEARNS: I don't think that is fair comment.

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THE COURT: I don't think your opinions really enter into it and I ask the jury to disregard anything relating to your opinion. Fair comment is fine. Personal opinions of counsel are not.

MR. TESTA: The fact of the matter is, they did bring my client into this case and what they are saying, we were not negligent, our ship was not unseaworthy, we are not responsible for this accident, but if by any chance you ladies and gentlemen of the jury care to believe Mr. Bernardini's story and even though we say we were not negligent and the ship was not unseaworthy, then we would like to shift that responsibility to the stevedore on some theory that the stevedore did not perform the stevedoring services in a workmanlike manner and to that I say hogwash.

We were on that ship as contract stevedores to load that ship. We were not there to perform maid services for the shipowner and we did load that ship and we did perform those services --

MR. STEARNS: This is also unfair comment and contradictory to what the law holds on this point.

THE COURT: I will charge the jury as to the law. I hope counsel will not discuss the law.

MR. TESTA: It is our contention we did perform the stevedoring services in a workmanlike manner and we are

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not responsible.

As a matter of fact, Chief Mate Stahl told you not in response to my questions, in response to Mr. Auslander's questions, that he was responsible for safety conditions aboard this ship. He was responsible for that ship and for the deck and I wrote it down, I made copious notes. He said that he was responsible to look out for safety conditions aboard that vessel. He said that he had specific orders from the company to look out for safety conditions on that vessel, and in response to a question by Mr. Auslander, he said that if there was any oil and grease on the vessel, any unsafe condition and he didn't do anything about it to correct it, that he would be responsible for it, but in spite of the fact their own mate said that it was the shipowner's responsibility, is, the chief mate's responsibility to look out for safety conditions, they now would like to say that it was the stevedore's responsibility.

We should have done something about their ship. Bear in mind, Mr. Stahl told you that these hatch covers were greased by the carpenter, that it was done at sea and he showed you, they have a little grease injection gun. He said they greased it at sea and I asked them, if any grease spilled whose job would it be to clean it up and

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he said the carpenter.

Nevertheless, they are now telling you we should have done something about this and I say that we did everything we were supposed to do. We lived up to our contract to the letter and we performed the stevedoring services in a workmanlike manner.

Mr. Stahl also told you that they washed down the deck on Saturdays. They gave the ship its Saturday night bath the Saturday before and I made a note of that, too, because here is a man who accepted the responsibility of seeing that this ship was safe, accepted the fact that he was told to watch out for safety conditions of it, accepted the responsibility, told you that they washed down the deck, they cleaned the deck.

So, you have a situation where if by any stretch of the imagination, and I can't see how you could, but if by any stretch of the imagination you believe Mr. Bernardini's story, then the chief mate should have done something about it. He told you he was right there. He was supervising the opening of four hatches and he walked around that No. 4 hatch four times, 8:00 o'clock, 8:15, 8:30 and 8:45. He didn't see any oil and grease, he didn't slip on any oil and grease.

He told you he did not see anything unusual about

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that pallet walkway, and if he thought it was unusual, he would have had it removed. He said it was done like that all the time in order to put pallets down.

Now, we had some discussion about midgets in this case and Mr. Auslander will tell you if there were midgets they couldn't see over this coaming, but you look at the pictures and see why they couldn't see over this coaming. They have to look straight down into the hold and the average man is not too tall and as a matter of fact, the testimony was that it was a short man who was the signal man here and that is the reason they had the pallet walkway so you could raise yourself up a little bit then look straight down into the hold.

Nothing unusual about that, nothing unsafe, nothing dangerous or improper or unworkmanlike.

Captain Wheeler told you that. Here is a man who has been around for a long period of time, 30 years at sea in the stevedoring business and he told you there was nothing unsafe, unworkmanlike about this pallet platform and I say to you ladies and gentlemen, if by any stretch of the imagination you believe Mr. Bernardini's story and you decide he is entitled to some money from the shipowner, they are not entitled to get that money back from my client because my client did not do or fail to

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do anything which in any manner could have contributed or caused this accident. They accepted the responsibility for the safety conditions on this ship and they can't now shift that responsibility to my client.

We did everything we were supposed to do. We were supposed to load the ship and we loaded it. If you want to believe there was any oil and grease there, Chief Mate Stahl should have done something about it. He was standing right there and he walked around the hatch four times. If he saw any oil and grease, he should have removed it.

If you want to believe there was anything wrong with that pallet walkway, Chief Mate Stahl was right there and should have told him to remove it and he didn't because there was nothing wrong with it. It was perfectly proper, usual and customery, nothing unsafe or dangerous about it. He didn't do anything about the oil and grease because there wasn't any oil and grease there.

I am only saying this to you in the event you believe this story and there was oil and grease there.

If there was, it was the shipowner's duty to clean it up and there was no notice to anybody in this case about there being oil and grease.

Mr. Bernardini couldn't get on that witness

stand and say that grease was there for a half hour or an hour to establish that somebody knew something about it and should have cleaned it up so he comes up with this story about seeing heel marks. There is no indication that anybody, the shipowner, the stevedore or anybody knew about oil and grease or had any opportunity to do anything about it and as far as the walkway is concerned, there is no indication that there was anything wrong with that walkway or that anybody should have done anything about it.

I say to you, ladies and gentlemen, in the first instance your verdict should be in favor of the defendant against the plaintiff. Mr. Bernardini has not established any negligence, he has not established that the ship was unseaworthy. He has not made out any kind of a case so that your verdict should be in favor of the shipwoner, but if by any chance you decide he has made out some sort of a case to your satisfaction and you decide Mr. Bernardini is entitled to some money from the shipowner, and I say to you again, that shipowner is not entitled to get that money back from my client and I ask you to bring in a verdict in any event in favor of my client, ITO.

You will be given some questions. Judge Ward is going to give you some questions about whether the plaintiff has established or made out his claim that the

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defendant was negligent and I say he hasn't.

You should answer that question no in my opinion. And you will be asked whether he has established his claim that the vessel was unseaworthy and I say to you he hasn't. And furthermore, you will be asked whether the stevedore performed in a workmanlike manner and I say to you the stevedore did perform in a workmanlike manner and is not responsible for any condition aboard this ship and I ask you again to bring in a verdict in favor of my client, ITO.

MR. STEARNS: Your Honor, Mr. Auslander, Mr. Testa, ladies and gentlemen.

First of all, this case has now gone on for quite an extended period of time, in part because of the fact there have been two lawsuits.

The first thing I would emphasize to you, lawyers do things in the hypothetical and no lawyer who knows what he is doing ever presumes on a jury verdict.

The fact that I am claiming over, as I am entitled to do against ITO in this case, is no expression of any lack of confidence by me of the testimony we have presented here today but this is something we do as a matter of course hypothetically if through any stretch of imagination you believe that Mr. Bernardini is entitled to any money here, and this deals with a matter of money,

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Mr. Bernardini is seeking money.

There has been a sharp clash in the evidence you heard during this trial. Mr. Bernardini testified first -- he has the burden of proof -- and he testified to an accident moments after he got on the ship the Svensksund.

His attorney drew this picture and drew this lighter outline which extends all the way around to describe the path Mr. Bernardini had taken. Mr. Bernardini himself drew the heavier line that appears on here and his testimony is this: That he was not a regular member of the gang. He was assigned to the ship and got there at about 8:45. He came up to the gangway, got to the top, looked and saw the mate.

Now, as I remember his testimony and it is difficult for me to try to recount it because it was so confused, I feel. As I remember it he said the mate was about two feet away from the head of the gangway and I think he said something about not having a picture or a camera when I asked him to be more specific.

The mate testified the gangway was about 25 feet away from the aft bulkhead of the midship house which has been explained to you as here.

In any event, he traveled along, walked up to the mate said, are you the hatch boss, as I remember the

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testimony of the mate and the mate said no, he also said he was not in uniform, then he started offshore.

When he went offshore, he walked through the area that is shown in Defendant's Exhibit D-1.

Now, Mr. Bernardini testified, I think, if I remember his testimony, there was absolutely nothing in the area. He also testified before he was shown this picture in response to a question I asked him, that the ladder he was looking for, the ladder into the hold looked something like a bathroom hamper. In other words, it had walls and a lid that flipped back. He was asked that before he was shown this photograph.

I suppose if I was clever and looking at it now, I would say it looks more like a steamer trunk, but this is a fairly reasonable representation of the bathroom hamper with a lid that flips back.

He walked right by this, right by that, 25 years a longshoreman, 25 years climbing into holds by means of ladders.

Why did he walk by it? He wanted to go over on the other side and find out where the ladder was.

He said there were two types of ladders. There was a coaming ladder which is affixed to the inside of the coaming, which is nothing but the wall around the

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hatch so water and people wouldn't fall in and there are escape hatch ladders or ladders shown in the form here and on that photograph.

Now, he said first, virtually the first thing he testified to as irrelevant was that the hatch coaming was about three feet high, then asked to describe where it was on his body. He pointed here.

That was the initial contradiction. In any event, it is clear from these photographs, from two photographs how high this coaming is, because in this photograph which is Exhibit D-1 again, the man is in the background standing against the rail of the ship and you can pretty well estimate how high this coaming is from his relative size.

Defendant's Exhibit D-6 shows another man which is again useful to estimate the height of the hatch and there he is right there in the corner. That is when the last hatch cover is being taken off.

It is quite obvious from this photograph and this one too, that somebody walking up to the edge of the coaming can see whether there is a ladder against this way, that way, this wall or that wall.

First he claims he was looking for the coaming ladder, then he said perhaps he wasn't looking for the

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coaming ladder but the facts are he wasn't looking for any ladder at all because he knew where the ladder was.

The fact that Mr. Bernardini forgot and there is no question he did forget, the physical arrangement of this ship is a lapse of memory alone is not significant. He said without equivocation he walked along, turned this corner, the upper after corner on this diagram and walked within a foot of the aft coaming, with that coaming on his left.

Quite obviously he can't do that. So what, he made a mistake, but that is only significant and it is terribly significant in considering Mr. Bernardini's explanation for why he was walking around. He was looking for a ladder and made Captain Stahl draw a diagram and there is no question he walked around this way because the mate was here all the time, he walked completely around the poopdeck, all the way around here and Captain Stahl indicated with a red pen where the poop deck was. He circled it. There was the area fenced off used as a swimming pool and this black line is the path that Mr. Bernardini must have taken all the way around the very tip, the rear end of the ship looking for a ladder into the hatch that he just passed, that he could describe without seeing the photographs.

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Is that at all plausible, yet that is not the most implausible thing you have heard during this trial?

When he made this turn, when he walked around here and got to point Y a foot or two from the corner, that would be the inshore aft corner, at that point he says he hears a crackle. Somebody fixing the boom. He looks up. He continues walking. It was read to you by his attorney from the transcript of his deposition that he walked 10 feet towards the pallets and then he indicates that things happen too fast, that he didn't see the grease or maybehe did see the grease and couldn't do anything about it but in any event, he was up on his tiptoes.

I read to you his prior deposition testimony in which he testified that he walked dodging the spots of grease on his tip toes all the way up.

That is absurd. Further, as he gets here dodging, tiptoeing and as he comes around with the coaming of the ship on his left, and by the way, this coaming has a lip which again is shown in Defendant's Exhibit D-1 right here, this is what I am speaking about and I referred earlier to the lip that appears on the face of the jury box, it is shown right along here. It is recessed somewhat as seen from the picture. There is a lip on this counter. The mate said it goes all the way around although this

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picture is not of the same area, what we are talking about is over here.

In any event, he is walking along with the coaming to his left, with the lip four or five inches out here. He is tiptoeing through the grease. He slips, he trips. Is that physically possible, slips, trips, twists, falls, strikes his right shoulder against the coaming and sustains no injury to his head.

Is that physically possible? Is it physically possible that somebody can have that type of accident?

Didn't Mr. Bernardini testify to a physical impossibility? Where on his shoulder had he sustained the accident.

Not at the point of his shoulder, here, but the Judge I remember referred to it is the collar bone after Mr. Bernardini pointed to it but how can you walk along, slip, twist, sustain an injury here? It would require the man literally to fall up. We are talking about a physical impossibility.

Captain Stahl testified without equivocation, without contradiction the very best he could in a language not his native tongue and he said to you without equivocation, this man laid down on the pallets.

There is in evidence and I am sure Mr. Auslander

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as is certainly his right, the report to the owners in which the captain stated apparently for no reason the longshoreman fell and that is the word he used in this report, on the walking board and then he says I witnesses everything, the chief mate Mr. Stahl to whom the whole thing seemed to be mere acting.

Now, the ship's officers are not lawyers and are not held to precision in the use of words that a lawyer is and the fact that he used the word fall instead of laid down as he testified to is totally insignificant.

What motive would Captain Stahl have to come to court during his vacation. He wants to go home 3,000 miles to Sweden, his homeland, to tell you a lie in this case? Why in the world would he do that?

There is talk about what the responsibilities were that Mr. Stahl had on the ship, safety responsibilities, whatever.

We say this. Mr. Graziano said that he fills out hundreds of accident reports each year. Mr. Bernardini, according to the doctor who treated him, had a contusion, an abrasion, a sprain consisting of some stretching of the muscles of the shoulder which disabled him in the doctor's opinion from October 28th to November 3rd. What reason? This kind of case for an owner who no

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longer employs him would this man have to stay in New York for a period of time longer than Mr. Bernardini was legitimately disabled? Why?

As I say, one of the unfortunate things in cases of this type is this hypothetical element, and I will try my best to emphasize it. The fact that ITO is in this case is no expression by me implied or otherwise of any lack of confidence in my case.

However, I have a client and I am required to touch all the bases as the lawyers say. However, it is also suggested that I not presume on your verdict though the evidence in this case is just overwhelming.

If, and I caution you again to go no further in your deliberations, go no further beyond finding there was no negligence and no unseaworthiness because there was no accident, but if we get first into the area of contributory negligence, that is only something you consider if you feel Mr. Bernardini told the absolute truth and that the captain did not.

Contributory negligence. This man slipped after walking 10 feet through grease on his tiptoes, greas he was aware of and saw. He didn't have to walk that way. He could have walked back. He could have held on to the coaming, he could have held on to the rail. He

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slipped and he tripped over the pallets.

Now, when he first reported this accident to the officer, he said unsafe passage. There is a pallet four inches in the way, it is unsafe. He can't walk over this. That is not a particularly good story because of the contributory negligence.

Now, assume, just for the purpose of argument, there is something wrong with having a pallet lying on the deck four inches high, Mr. Bernardini cannot be reasonably asked to step over that. If he trips on that, he is guilty of contributory negligence because even if you believe --

MR. AUSLANDER: I will object to what counsel is stating as his interpretation of the law.

THE COURT: The law, ladies and gentlemen of the jury is the province of the Court. It is my obligation and I will fulfill my obligation by instructing you in this court.

However, I note from my own experience there are occasions during summation where counsel will touch briefly on matters of law. I trust none of the counsel will impinge substantially on the Court's function.

MR. STEARNS: You might consider if you believe there was something improper about this, you might inquire

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what about Mr. Bernardini's contributory negligence, why didn't he step on it and over as most people are capable of doing, certainly a robust man like this man.

So, the pallet story is not good enough because it enormously, in my belief, impunes to Mr. Bernardini and contributory negligence.

Two things were later brought into the case to excuse Mr. Bernardini's contributory negligence and again I say that contributory negligence follows after the finding of an accident; and that is the cracking of the boom and the second thing is the grease.

Mr. Bernardini comes to you with a story of slipping and twisting because he can't stand the story of unsafe passage, tripping over the pallet because of contributory negligence. There was no grease on the deck. Mr. Bernardini did not say there was any grease on the deck. He did not tell the mate, he did not tell the foreman, the pier superintendent, the timekeeper, whether there was any grease on the deck. His story was unsafe passage.

For example, there was no grease on the deck. That is why the grease is in the case in my view.

However, if you accept every word the plaintiff says, and again I caution you this is not an expression of any lack of confidence on my part, if you believe

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an accident, if you believe grease, if you believe a pallet creates an unsafe passageway, then you must believe contributory negligence and an enormous amount if this accident happened, if Mr. Bernardini in broad daylight is walking through a relatively wide passageway, could see in front of him, was no longer obstructed by cracking, what percentage of the cause of that accident is his own fault and an enormously high per cent.

Now, as far as the jury is concerned, I say nothing more than what Mr. Testa said. Dr. Tagliagambe treated the man. I think he testified on the 31st, which I think was Friday, about that time, he said that he thought Mr. Bernardini would be able to go to work the next Monday. He saw nothing later to change that opinion. He was the treating doctor and said there was no permanent injury involved to this type of accident, the top of a shoulder, scratches, some stretching of a muscle does not necessarily result in a permanent injury. He said so.

Dr. Lodico testified that after two years after this accident, there was no permanent injury. There is not even a legitimate six week period of disability. Dr. Tagliagambe testified candidly said this man could go back to work and nothing he has seen changed that opinion.

As I say, three, four, five, six days over work,

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the mate is over here from Sweden to tell you an untruth.

I ask you to listen to the Judge as to the law. The Judge will explain to you what the duties of the stevedore are in a circumstance like this again to a question way down the road after you consider whether there was an accident here.

The evidence is absolutely overwhelming. There was no accident. A man testified who has a reason to misstate his testimony, Mr. Bernardini. He has a direct financial interest in this proceeding.

A man testified without any motive. He no longer works for the ship company. He came all the way from Sweden -- he didn't come all the way, he works here.

Mr. Bernardini's story is inherently fantastic. He contradicted himself, he gave evasive answers throughout his testimony and he described an accident physically which could not have occurred.

The fact is in this court and proceeding for the length of time it has is not significant. Nobody reviews the facts of this case before you do. Not Judge Ward, not any other member of this court. The decision on this case is yours and it has not been prejudged.

Thank you.

THE COURT: Mr. Auslander.

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MR. AUSLANDER: If your Honor please, Mr. Stearns, Mr. Testa, Madam Forelady, ladies and gentlemen.

There has been a lot said by Mr. Stearns and Mr. Testa, things which not only do I take issue with but upset me greatly and I will tell you why.

MR. TESTA: I can't hear you.

MR. AUSLANDER: Sit over here then.

THE COURT: I can't hear you, either.

MR. STEARNS: This to me is not fair comment. Mr. Auslander is going to comment on his personal reactions on something that Mr. Testa and I have said in performing our job.

THE COURT: Just as I am sure I indicated to counsel previously, counsel's personal feelings are no part of this court.

I would appreciate, though if you would keep your voice up.

MR. AUSLANDER: Everything that pins liability on the defendant is a clearly contrived story. These are the words both counsel used as if it was rehearsed. Everything which shows that the ship was unseaworthy or that the company was negligent is a cleverly contrived story. What they are trying to infer is that the attorneys induced fabrication, that was the word that was used,

rkrf 113

asked the man to lie, saying things about our office that in the courtroom he can say but once walking outside would be open to charges of slander.

I don't impune any counsel. I may not agree with their client. I may think that their client is not bringing you all the evidence, but I don't say that somebody put somebody else up to come into this court to tell lies, to fabricate on the witness stand.

Who are we dealing with? Mr. Bernardini. You will hear the Judge tell you about the reasonable man, and that is the reasonable man in his walk of life, not the reasonable attorney and he he looks at things, not the reasonable court reporter or Judge or the reasonable longshoreman with an eighth grade education. A simple family man supporting his wife and children, never been in trouble with the law,unsophisticated.

That is the man that you are dealing with, that is the man you have to keep in your mind when you listen to what he said and how he said it.

They make great argument about it being impossible to walk around that hatch. Agreed. Pontoons, if up, do present an obstacle; but let's look at all these facts. We know and nobody denies that this man was on the ship one time that morning, has never been on the ship since,

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was on that ship for a minute and a half, and now he comes in and says that he walked around the hatch.

Ladies and gentlemen, do you remember the first day that you came into this courtroom and you went out for lunch. You had been here I don't know how short a period of time. You went down the elevator and came back and I happen to be sitting by the doorway and a great many of you came up, you didn't know where to go and I pointed out like this; do you recall that?

MR. TESTA: I don't think this is proper comment.

THE COURT: Let's get on with it.

MR. AUSLANDER: I am trying to show you memory. If I ask you without looking up how many lights are in this courtroom, you have been sitting here all day for a whole week, do you remember? That is what we are dealing with.

The fact that the man says as he now recollected it that as he came around the hatch, instead of coming around the outside of the poop deck, that isn't the reason to throw him out of court and say that he is a liar because it doesn't really matter whether he climbed over, threw over, walked through. What is important, and what even the mate admitted to, the man came on, walked right past, had him in view for about 30 seconds and the next time he saw him he is coming around the hatch. Maybe 30

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seconds to a minute later at most.

To make so much about a physical impossibility and that he didn't know what the pictures were going to show, I agree with you, but that doesn't make the man out to be a liar. Remember, on this question of proof as the Judge is going to tell you, I on behalf of my client don't have to convince you of anything beyond a reasonable doubt.

MR. TESTA: Now he is getting into the province of the Court.

MR. AUSLANDER: This is fair comment.

THE COURT: It isn't, really. I will charge the jury on the burden of proof and the standard of proof in this case. I think it is better you spend your time commenting on the facts and the evidence.

MR. AUSLANDER: I will try.

This is just an attempt, one of their attempts to cloud the issue and raise other issues to take your mind off the main claim.

The mate says and this is important, that when he came around the man looked up and looked around. Why did he look up and look around? Because he heard the boom being adjusted. The mate himself admitted that there was somebody on the offshore side adjusting the boom. This isn't something that attorneys fabircated.

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The mate said that the man was in plain view, I was looking at him, and Mr. Bernardini said that, this man was facing me.

Let me ask you something, ladies and gentlemen. The inference was that this man was an accident looking for a place to happen. That is a crime. It's a fraud. Do you really think that somebody is going to have an accident or make believe he is having an accident in full view of the witness?

I asked the mate, were you hiding, were you behind something?

Maybe he was out the way so Mr. Bernardini didn't see him, so he decided to take his fall, but the mate said no, I am standing there in full view 20 feet away. I am 20 feet away from you now and if I am 20 feet away from you and you are looking at me and I am looking at you, am I going to start kneeling down and laying down right in full view and say later on that I had an accident?

Does that make sense to you; not to me. Nobody does things like that and tries to get away with it.

The mate says that the man knelt down, then laid down.

His statement; Fell upon this walking board.

I asked him specifically, I knew he had some

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problem with English, do you know the difference between laid down and fall upon; yes, I do, he said.

Do you know the difference between kneel down and fall over; yes, I do, he says.

He also said that the man didn't make any complaints of pain. He had no pain and the statement says made complaints about great pain.

MR. STEARNS: Would you read that correctly.

MR. AUSLANDER: Would you be quiet.

THE COURT: The jury will have the opportunity to see the statement.

MR. AUSLANDER: And I said to him do you know the difference about compalints of pain and no pain and he said, yes, I do. He didn't even get the shoulder right.

Mr. Bernardini's story is consistent all the way through. As he came along that inshore side, the man who was working the boom pulling on it, the cracking noise. The mate said that when you pull on it you will hear a noise. It is a cracking noise. When you are bringing over cargo and you are moving things around and booms can fall, you look to see what is going on and that is what he did, a reasonable act. He says everything is okay, he keeps on walking and before he knows it, he sees

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spots of grease so he does try to get around it. What you and I would do if you are walking in an area and all of a sudden you are confronted first with spots of oil or grease, you try to dodge it but he couldn't and he slipped and when he slipped, he fell forward. He lost his balance, he told you, and he tripped over these pallets and when he tripped over these pallets, he fell in a twisting motion.

Mr. Stearns made great to do how could you hurt the top of your shoulder? It puzzled me too until Mr. Stearns asked his own mate what is sticking out from here and the man says it is a flange coming out about four inches.

If you have a flange coming out about four inches and you fall into it, what are you going to strike, the top of your shoulder, exactly what the man said happened to him.

There was talk about photographs. They had to bring in photographs premarked with an X. This wasn't marked here in court. They were premarked with an X. Why? So counsel himself would know where this ladder was.

MR. STEARNS: That is absolutely not fair comment.

THE COURT: I don't really think that is

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appropriate. The jurors could look at the photographs and make their own evaluations from them. You may assist them in this regard.

MR. AUSLANDER: Somebody marked these photographs before they were brought into court. They were not marked by the witness.

You look at this, does this look like a ladder to you? I don't care whether a man is a longshoreman for 100 years. He was looking for a coaming ladder and that is what he said and he walked right past it. We don't even know whether this thing was open or not. He said he didn't notice it. I submit to you, ladies and gentlemen, if you are walking over here on the offshore corner and you ask somebody -- I am sorry, and you are walking over and you don't see a ladder and you look over the side and you don't see a coaming ladder and you see someone standing and you walk right by, you wouldn't even know that is an opening for a ladder. A perfectly consistent story.

Mr. Stearns is saying in these pictures here is someone standing alongside so you can see how high the coaming is. If the coaming is only that high up to this man's waist, why do you have to stand on something else to look over it?

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When you walk out of here, walk alongside this railing and casually look over. Can you see whether you, as short as some of these ladies are, whether you have to have something to stand on to look over the side.

They are trying to say that cargo may be loaded close to the edge so you have to peer over. Cargo is not loading close to the edge. If it is, it will bang into it.

MR. TESTA: There is no testimony in this case as to how cargo should or should not be loaded. I think this is unfair comment by counsel.

THE COURT: I think this is within the realm of fair comment and I will allow it.

MR. AUSLANDER: As I recall the testimony there were questions asked of the mate or the expert whether you have to look over where cargo is loaded and I think Mr. Stearns said if you want to get cargo into the wings don't you want to load it as close to the side as possible.

THE COURT: Let's get on with it, not the commentary.

MR. AUSLANDER: Common sense tells you you are not going to land cargo right next to this metal wall because when it comes down it might swing and hit something and when you land it in the middle, that is 5, 10, 15 feet

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into the square of the hatch. Don't tell me you can't look down into the hatch without standing on something.

We have these other pictures. This is Defendant's Exhibit 5 showing you all these wheels. All these wheels on the pontoons.

Let's talk about common sense. You don't have to be a sailor or a seaman to know physical facts. Metal exposed to the elements gets rusty. Rusty metal of moving parts makes them inoperable. A vessel going across an ocean all year long voyage after voyage being in the water 12 months out of the year as the mate said, in storms and in heavy seas with water washing over the sides, snows, these wheels being used every time the hatch is open or closed in every port; are you going to believe that these 16 steel wheels, and he did say steel after I kept pressing him and pointing out which ones I was talking about, are you going to believe that these 16 wheels are lubricated one or two times a year like he said?

Physical facts, that ship would be a rust bucket and fall apart if it was greased and oiled once a year.

That is where that grease or oil came from.

I don't have to show you why it got there. All I have to show you is that it was there and that they knew or should have known about it. It makes sense

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when these wheels are greased and they are opened and closed with the wheels turning, some drops are going to fall off on to the deck right alongside and that is exactly where they came from.

Picture in your mind if you took a rollerskate which is a wheel --

MR. TESTA: There is no testimony in this case about where any of the alleged grease came from and this is an improper inference for the jury to draw.

THE COURT: You are entitled to argue that the jury should draw an inference as to placement from where it was placed to where it was found and they have a right to accept or reject inferences.

MR. AUSLANDER: If you take a rollerskate wheel and oil it such as these are wheels and they are rolling back and forth and spinning, drops can come on the deck.

I don't know if that is where it came from but as I say, I don't have to prove where it came from. It was there.

There are regulations that the Judge is going to tell you about, specifically --

MR. TESTA: I will object to any comment by counsel.

MR. AUSLANDER: I can't discuss the regulations?

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THE COURT: The Court will take judicial notice of the regulations.

MR. AUSLANDER: Can I read the regulations?

THE COURT: You can't. The Court will read the regulations.

MR. AUSLANDER: Listen to the regulations that the Court will read to you. One concerns itself with slippery conditions --

MR. TESTA: Objection.

MR. AUSLANDER: It is fair comment. I am not going into the merits.

THE COURT: You are not to read them.

MR. AUSLANDER: I am not.

THE COURT: Maybe a brief comment and get on with it. Don't do by indirection what I told you not to. You know how I am going to charge the jury.

MR. AUSLANDER: One regulation deals with slippery conditions --

MR. TESTA: Objection. This is an outright disregard of the Court's direction.

MR. AUSLANDER: I am not reading the regulations. I am advising the jury what our claim is.

MR. TESTA: You were told not to.

THE COURT: Proceed.

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MR. AUSLANDER: One regulation deals with slippery conditions and I ask you to listen to how the regulations reads.

Another regulation deals with stumbling hazards and I ask you to listen to what happens, to that particular portion and another regulation deals with equipment when not in use, what should be done with it.

These regulations are made by the Department of Labor --

MR. TESTA: Objection again.

THE COURT: I will charge them this.

MR. AUSLANDER: The regulations as far as I am concerned --

MR. TESTA: Objection to what is taking --

THE COURT: He is withdrawing that comment as far as he is concerned.

MR. AUSLANDER: Regulations are not to be ignored. They are made for a specific purpose. They don't make regulations for the fun of it. Are you to believe a so-called expert that comes in who hasn't worked on ships since 1953 and says it is the custom and practice on all the ships he goes on to see these walkways constructed on the ships?

Listen to what he said and remember what the

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regulations read.

Whether or not these walkways, these wooden boards can go over the deck.

Why do we want the decks cleared? A very important reason. When men are working on decks and cargo is coming overhead, hundreds of thousands of pounds and lines and they have to pull and yank and so forth, their attention is rivoted above and if they have something they could stumble over or slip over when it shouldn't be there, that could make for a very hazardous ship, so we have regulations specifically passed.

He says that he needed these walkways to look over and Mr. Stearns or Mr. Testa said I talk about midgets I am not talking about midgets.I am talking about the normal person. The normal person did not need on that ship where the testimony was that the coaming was between three, maybe four at the most feet high, that the rail even less; did not need anything to walk over to obstruct that deck in order to do the job that they wanted to do and it was there for two ~~cases~~ DAYS, the mate saw it, he knew it and he left it there.

I submit that the mate came in trying to protect himself. He failed to safeguard the ship and he left a dangerous and hazardous condition there. He admitted,

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and he made notes on this, the company will hold me responsible for safety conditions.

Your Honor, I have had a lot of interruptions and I ask that I be given extra leeway.

THE COURT: Proceed.

MR. AUSLANDER: He said he would be responsible for the conditions. He would be blamed if something was wrong, he would be held by the company if anyone got hurt and it was his job to clean up the conditions so he says that nothing was wrong. He didn't see anything dangerous.

I don't think that that is proof that nothing was there. I think merely it was proof that he was negligent in taking care of it.

He never told anyone from the stevedores that this man was a phony. He said that he told the stevedore boss and he told this one and that one where are they, only the timekeeper was brought in --

MR. TESTA: Objection.

THE COURT: I think under the circumstances, sir, you know the reaching power of subpoena, do you not?

MR. AUSLANDER: Yes.

THE COURT: Let's get on with it.

MR. AUSLANDER: I didn't bring in those men. I admit it. I didn't think they were going to refute

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Mr. Bernardini's story.

MR. STEARNS: Your Honor --

THE COURT: That is the second time in the last two or three minutes where you have said what you think. It seems to me I have said enough to all counsel relative to their personal opinions. Let's get on with it now.

MR. AUSLANDER: The mate makes up some kind of statement that he says he made an abstract and he made a draft but he didn't put it into the logbook, the official logbook, he forgot. He didn't have time yet he had time to make the draft, the abstract but he never had time to make the logbook entry the next day.

I submit that he was afraid to make a logbook entry, an official document, so he makes up something like this.

Let me go into the medical portion and we will be finished.

After the man fell down he was sent to the company doctor and I say company doctor. Why do I say it? Despite the fact there may be a panel of six names on the wall of the office of the timekeeper's office to send the men to, they are all company doctors. This doctor had his own slip there ready to be signed and sent.

He says to the man, go back to work in three

rkrf 128

days. He treats him for contusions, sprain and abrasions but he sent him back right away. Why does he send him back right away? The company doctor wants to get him back to work, but Mr. Bernardini goes to his lawyer, a normal thing. I say to you thank goodness for indenendent agencies, for lawyers who can protect people, who can send a man to the Department of Labor to get a consultant to examine him, then have the man go back for more work.

The day of, if you don't come in tomorrow, don't come in at all is overwith.

What do we have? He says, Dr. Tagliagambe, he had no defects in motion, tenderness or pain or backaches -- I am sorry, any pain in the acromio clavicular area.

What did Dr., the consultant from the Department of Labor say, pain, limitation of motion, 25 per cent. 10 per cent. It's here, you can take this in and read it.

Who has less of an ax to gring, the company doctor or the Department of Labor consultant?

They find the man 25 per cent, 10 per cent, different limitations. Dr. Graubard said 17 per cent. Dr. Lodico says nothing.

MR. STEARNS: Objection. That is a misleading comment.

THE COURT: The jury will recall what Dr. Lodico said. He said it this morning and I am sure if they don't recall it they can have his testimony read back.

MR. AUSLANDER: Then Dr. Tagliagambe has the gall to say that this man was actively restricting his motion and I said to him where do you find that in your record, and he said it is not there and I said how do you know and he said he has a system, a secret code that he uses to put down words like that, then he said the man had definite and physical improvement, and I said where do you find the word definite and he said it wasn't there either, it was also part of his code.

I asked Dr. Lodico the same type of question. It wasn't there therefore he knows what should have been there because he has his own system. If it isn't this way, then it has to be the other way, yet nowhere is it written.

In conclusion, I ask you to award money damages to this man. Number one, he is out of work straight for six weeks. That is approximately, I think he testified and your recollection is best, somewhere between $160 and $180 a week.

Your memory will reflect on that.

Then the doctors' medical expenses were $145,

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you recall that. By the way, would he give him all this treatment unless he found something wrong with him?

Then he testified that even after he went back to work he lost about 12 to 15 days intermittently, that is equivalent to two weeks so we put two more weeks on top of that.

Now, the body is like a symphony orchestra. When everything is working good, it sounds beautiful. When something is wrong, a violin out of tuen, it is terrible. If you have something wrong with you, you feel it all over. Something is not right. When you are in pain, you don't want to do anything, you are grouchy, you can't get along with your family, you will not even sit down and watch TV. People will take medication, shots to go to the dentist to get rid of a minute and a half worth of drilling. Nobody wants pain.

This man says he is in pain to this day when he does arduous labor. Even Dr. Lodico admits when the climate changes you could have pain and Dr. Lodico said he didn't think for a minute that the man wasn't telling him the truth.

I said do you doubt his veracity and he said no, the man was honest with me.

The body comes into being from nature in a perfect

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manner and if somebody does something to disrupt it, they should be forced to pay and I ask you, the man has a life-time of 28 years. He has a work expectancy until 65, he is some 43 years of age now. I ask you to give him money for the weeks while he was disabled since and into the future. I don't know how much is right or wrong. Might I suggest if he is 17 per cent, 17 dollars a day.

MR. STEARNS: That is wholly improper.

THE COURT: Yes.

MR. AUSLANDER: I leave to your best judgment --

THE COURT: It is a matter for the jury.

MR. AUSLANDER: I leave it to your best judgment what is value for him.

Ladies and gentlemen, thank you very much for listening. I appreciate your attention. I ask one thing, that when this case is over and you come back with a verdict, you can honestly look Mr. Bernardini in the face and say, we did just for you. He can't come into court again. It is a question of fact, is he telling the truth or isn't he? Was he hurt or wasn't he?

Thank you.

THE COURT: Ladies and gentlemen, we will take a five minute recess to give you a chance to stretch. Please do not discuss this case among yourselves even at this late juncture and keep an open mind. You will return in five minutes and I will charge the jury at that time.

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Frank Bernardini

vs

Rederi A/B Saturnus, et al

October 23, 1973

CHARGE OF THE COURT

THE CLERK: The Court is about to charge the jury. Any spectators wishing to leave may do so now or remain seated until the completion of the Court's charge.

Will the marshal lock the door.

THE COURT: Ladies and gentlemen of the jury, we have come to the point in the trial where it is my function to instruct you as to the law. Following my charge on the law you will retire and deliberate in order to render a verdict.

It is customary in our court for the juror occupying seat No. 1 to be the foreman or forelady, in this case Mrs. Nettie G. Farrow who occupies seat No. 1 will serve as the forelady.

Most of the issues in this case have centered about matters that are not normally within our common experience, or at least the common experience of most of us.

It has been evident to me from the very start of the trial that each of you has paid very close attention

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to the evidence as it came in and you are prepared to discharge your final duty. This duty is to decide the fact issues in the case.

As I have indicated on prior occasions, you members of the jury are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses. You resolve such conflicts as there may be in the evidence as between witnesses or otherwise and you draw whatever reasonable inferences as may be warranted from the facts as you and you alone determine them.

In your determination of the facts, you rely upon your recollection of the evidence. Anything that counsel for the plaintiff or the defendant or the third party defendant may have said during the progress of the trial with respect to any fact matter or included in any question or advanced in the closing arguments which you just heard is not to be taken in place of or in substitution for your own independent recollection of the evidence.

So too, anything the Court may have said during the trial or may say during the course of these instructions with respect to any factual matter, again, is not to be taken in place of your own independent recollection which governs at all times.

I do not want you to infer from any questions I

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have asked during the trial or any comments which I may have made during the trial that I have any position with respect to this case.

I am here to instruct you as to the law and that is my function. You are here to try the issues of fact. That is your function.

As I noted during the course of the trial, if you do not recall something and you want to refresh your recollection once you have retired to the jury room, you may call either for the exhibits which have been admitted in evidence in the case or you may request that portions of the testimony be read back to you by the court reporter.

As I indicated, my function at this point is to instruct you as to the law that is applicable to the case. It is your duty to accept these instructions of law and apply them to the facts as you and you alone determine them.

What we are really trying here are the issues in two separate cases. First there is the action brought by Frank Bernardini against Rederi A/B Saturnus, the owner of the S. S. Svenskund.

At times during this trial I will refer to Rederi A/B Saturnus or the defendant or the shipowner. All of these references will be taken by you to mean the same party.

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The S.S. Svensksund was the vessel on which Frank Bernardini was assigned to work on October 28, 1969 when he alleges he sustained the injuries which are the subject of this lawsuit. That is the first case you will be trying. Frank Bernardini against the defendant shipowner.

In the event you find that an accident occurred and you find that the shipowner is liable to the plaintiff, there is in turn the second case or the so-called third party action by the shipowner against International Terminal Operating Company, Inc., Mr. Bernardini's employer.

I may sometimes refer to International Terminal Operating Company, Inc. as ITO, the stevedore or alternatively, the third party defendant.

There you have the parties, plaintiff Frank Bernardini. The defendant and third party plaintiff Rederi A/B Saturnus the shipowner, the third party defendant, ITO, the stevedore who was Mr. Berndini's employer.

The third party defendant had been engaged by shipowner to do stevedoring work aboard ship. That included, as you recall, loading cargo in the No. 4 hatch. The principles of law which govern each of these two cases are different. We will first consider the plaintiff's case against the shipowner since how you decide this determines whether you ever reach the shipowner's case against the

rkrf 5

stevedore.

You understand, of course, since the shipowner and the stevedore are corporations, they act through their officers and employees and are responsible for acts committed or omitted by them in the performance of their duties.

Plaintiff seeks the recovery of damages from the shipowner under an ancient law of the sea known as the warranty of seaworthiness.

This so-called warranty of seaworthiness imposes upon the owner of a vessel the duty to supply the crewmembers with a seaworthy vessel, that is, one reasonably fit for its intended purpose or use, or stating it another way, one reasonably fit for crewmembers to discharge their functions. This not only means that the ship shouldn't have holes in it so it would take in the sea water and sink, it means more than that.

The shipowner's duty to supply a shipworthy vessel extends to furnishing appurtenances and appliances which are reasonably fit for their intended use. The shipowner's duty is a continuing duty and to use legal language, it is not delegable. It can't be passed along to another person.

The plaintiff, as you know, was not a regular member of the ship's crew. He was a longshoreman employed

rkrf 6

by ITO, the third party defendant which had been engaged to perform stevedoring services aboard the ship. However, since Mr. Bernardini was engaged to perform a job aboard the vessel usually performed by the ship's crew, he too was entitled to the benefit of the warranty of a seaworthy vessel, just as if he was a regular crewmember.

The shipowner's duty to supply such a seaworthy vessel as I have already noted, extended to furnishing appurtenances reasonably fit for their intended use.

The shipowner's duty to provide a seaworthy vessel to Mr. Bernardini was completely independent and separate from whatever duty his employer, ITO owed to him.

The shipowner's duty is absolute. If it fails in its duty and proximate result a crewmember or in this case a man doing a crewmember's work, is injured, then the shipowner is liable for the resulting damages. This absolute duty is imposed even though the shipowner may be free from fault and even though its officers knew of the alleged unseaworthy condition.

Liability for an alleged unseaworthy condition does not in any way depend on negligence, fault or blame. In short, even the exercise of reasonable care does not relieve the shipowner of its absolute duty to those engaged in ship's service to furnish a seaworthy vessel.

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Is the fact of unseaworthiness which renders the shipowner liable if as a proximate result a seaman or man working aboard ship sustains injury.

I have mentioned proximate result two times now. Sometimes the word is referred to as proximate cause. At this point I would like to explain what we mean by proximate cause.

By that is meant an unbroken chain of events flowing from an unseaworthy condition or negligent act and leading to the injury complained of. If the chain of events flowing from any unseaworthy condition is broken by some other intervening act which causes the injury, then proximate cause between the unseaworthy condition and the injury is not established.

In other words, there must be a connection, what we call a causal connection between the alleged unseaworthiness and the injury. I have referred to the shipowner's absolute duty to furnish a seaworthy vessel. This does not mean that the shipowner was required to furnish an accident-free vessel.

In determining whether a vessel is seaworthy, the standard to be applied is not absolute perfection, but reasonable fitness.

I have already instructed you that unseaworthiness

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is a condition whereby a vessel or its appurtenances or appliances is not reasonably adequate and if that condition of unseaworthiness exists at the time of the accident and is a proximate result a crewmember or contractor's employee is injured, the shipowner is liable no matter how the condition was brought about or who brought it about.

Let's take a seaworthy vessel with appliances that are reasonably fit for their intended use or purpose on which normal operations are in progress and during the course of such operations the previously fit vessel or appliances are rendered unsafe because of the negligent act of some person.

In such an instance, if the negligent act itself is in process and has not yet ripened into an unseaworthy condition, the act during its commission is referred to as operational negligence.

In this circumstance, the shipowner would not be liable. In other words, if the defect arose as a momentary step or a failure in the progress of work aboard an otherwise seaworthy ship and was an isolated incident in the continuous course of operation and an unseaworthy condition had not yet resulted, the shipowner is not liable.

On the other hand, if the isolated or momentary

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failure enabled the act to ripen into a condition of unseaworthiness at the time the accident occurred, then the shipowner is responsible.

Thus, this is the point at which negligent conduct ends and an unseaworthy condition begins.

If the act results in a condition of unseaworthiness at the time of the accident, then the owner is liable. If the act falls short of creating a condition at the time of the accident, it is not.

Bear in mind at all times that unseaworthiness is a condition and how this condition came into being, whether by negligence or otherwise, is irrelevant to the owner's liability if in fact it existed.

Plaintiff claims damages for personal injuries suffered as a proximate result of the unseaworthiness of the vessel in general and the working and/or walking area of the deck in particular.

Plaintiff contends that on October 28, 1969 while he was employed as a longshoreman by ITO, he came aboard the S. S. Svensksund and was looking for the coaming ladder leading down into the No. 4 hatch, when he slipped on some grease and oil on the deck.

He testified as he fell, he twisted his body and tripped on some wooden pallets which had been placed

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on the deck. He contends in the process his right shoulder hit the hatch coaming. He testified that his shoulder began to bleed and hurt. He got up, went to the timekeeper's office where he reported that he had an accident. The timekeeper made out a report which is Third Party Defendant's Exhibit B and sent him to Dr. Tagliagambe.

You heard plaintiff's testimony as well as the testimony of the timekeeper Mr. Graziano and of Dr. Tagliagambe.

In addition, you heard the testimony of Dr. David J. Graubard and Dr. Lodico relative to the nature and extent of the alleged injuries.

The parties disagree as to whether the accident happened, and, if you find the accident happened, as to the cause of the accident. The shipowner produced Rune Stahl who was chief officer of the S. S. Svensksund on October 28, 1969. Mr. Stahl testified that he saw the plaintiff lay down rather than slip and fall. He testified that when Mr. Bernardini was about 20 feet away from him, Mr. Bernardini stopped, looked around, got down on his knees, lay face down on the pallets and started screaming.

Plaintiff, on the other hand, alleges that the deck where he was walking, at the time of the accident, which was a working and/or walking area was in an unseaworthy condition due to one, grease or oil on its surface making

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it slippery to walk upon and two, blocked and encumbered with tripping hazards. In this case, these pallets to which I have made reference, and that these conditions were present at the time of the accident and that had been allowed to so remain for some time prior to the accident.

The defendant shipowner on the other hand disputes this. It contends that there was no accident. It further contends that even assuming there was an accident, there was no grease or oil on the deck. This was at most a temporary condition and did not, of itself, render the S. S. Svensksund unseaworthy.

Finally, the defendant contends even if you should find that there was an accident and that the vessel was unseaworthy, that Mr. Bernardini, if not wholely responsible for the accident due to the fact he was not looking where he was going, did nevertheless contribute in part by his negligent conduct in not looking where he was walking and the damages should be reduced accordingly.

There were other witnesses who testified. One of these was Captain William Wheeler. Captain Wheeler was asked for and as you recall gave an opinion during the course of his testimony regarding the practice on the waterfront of constructing walkways made up of pallets to assist the gangway men in the loading and unloading of

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cargo.

As I recall his testimony, and of course it is your recollection that governs, he said it was customary to construct platforms of pallets to enhance the vision of gangway men in connection with the loading and unloading of cargo.

When a case involves a matter involving special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion. The opinion stated by such expert who testified before you was based on particular facts.

In this case it was Captain Wheeler. The facts were put to him by his counsel who questioned him and asked him, if you will recall, to assume certain facts then to relate these facts to other experiences which he had had on the waterfront.

In evaluating the testimony of an expert witness, you may take into consideration the experience, training and facts available to the expert. You may reject an expert's opinion if you find the facts differ from those forming the basis of the opinion.

You may also reject his opinion if after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion.

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In other words, you are not required to accept the expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Such opinion is subject to the same rules regarding reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion and it is entitled to such weight as you find the expert's qualification in his field warrants.

It must be considered by you but it is not controlling on your judgment. The mere fact that you find an accident did occur and that Mr. Bernardini was injured as a result, does not by itself establish unseaworthiness or by itself entitle the plaintiff to a recovery of damages.

The defendant as the owner of the vessel was not an insurer of Mr. Bernardini's safety. Mr. Bernardini having made the charge that an unseaworthy condition existed at the time of the accident has the burden of proof and also that it was a proximate cause of the accident by what the law terms, a fair preponderance of the evidence.

What do we mean by a fair preponderance of the evidence? This refers to the quality of the evidence not the number of witnesses. It means that the evidence submitted by the party having the burden of proof on an issue must be more persuasive and convincing than that opposed to it.

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Sometimes in this court we give jurors an example in the hope it will give a clearer idea of what we mean by a fair preponderance of the evidence.

Assume that you are in the jury room and reviewing the testimony and you find evidence that appears credible to you. It favors in this case, let us assume the plaintiff's side of the case. Imagine that you have an apothecary scale of justice before you. You put that portion of the evidence on the plaintiff's side. On one side of the scale.

As you proceed, there is evidence which favors the defendant's side of the case. You put that on the other side of the scale.

You do this until you have reviewed all the evidence in the case.

If at the end of your review of the evidence, the evidence which you find credible, plaintiff's side of the scale is weighted in his favor, no matter how slightly, he has sustained his burden of proof by a fair preponderance of the evidence.

However, if the two sides of the scale are in balance, they are even, then the plaintiff has failed to sustain his burden, and if the defendant's side is weighted upon the defendant's side, then obviously in that case the plaintiff has failed to sustain his burden of proof.

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You will review all the evidence and all the probabilities in making your determination as to whether or not the plaintiff by the weight of the credible and believable evidence has sustained his burden of proving unseaworthiness. You are not to speculate as to whether the ship was unseaworthy, you are not to guess. Your determination must be based upon the facts and the reasonable inferences from the facts as you find them.

So-called direct evidence is not required. Your determination may rest on circumstantial evidence, which oft-times may be more persuasive than direct evidence.

If you find that it is just as reasonable to infer that the accident was not due to unseaworthiness as it is to infer that it was due to unseaworthiness, then the plaintiff has failed to sustain his burden of proof.

That would follow since in that situation, the scales are evenly balanced.

On the other hand, if a piece of equipment dramatically malfunctioned such as in the case of a brake, absent other explanation for its failure to so function in its normal and customary manner, malfunctions, you may but need not infer that it was defective, that is, that it was unseaworthy.

I have already referred in general terms to the

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contentions of the plaintiff and the defendant. I have not reviewed in detail the evidence relied upon to support their respective contentions. Counsel, in their summations this afternoon reviewed in detail the evidence in support of their claims and it would be needless repetition for the Court to summarize at length the testimony of each witness.

However, you must consider all the evidence in the case. If upon all the evidence you find plaintiff has sustained his burden, that an accident occurred and that a condition of unseaworthiness existed by reason of the presence of grease and oil on the deck or that the deck was blocked or encumbered by pallets and that such unseaworthiness was the proximate cause of the accident, either in whole or in part, plaintiff is entitled to recover.

On the other hand, if you find that the accident did not occur, or that there was no grease or oil on the deck or that the pallets were installed in a workmanlike manner and did not represent a tripping hazard and did not thereby render the vessel unseaworthy, or that if there was oil or grease, that the presence of the oil or grease represented a temporary condition or that the accident was due solely and only to Mr. Bernardini's own negligent conduct, then the shipowner would not be liable.

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If you find on all the evidence unseaworthiness Mr. Bernardini did not assume the risk of working on the vessel. However, this did not relieve him of his duty to exercise reasonable care for his own safety. He has a duty to exercise reasonable care for his own safety commensurate with all the attendant circumstances and if he failed to do so and thereby also by his negligence contributed to the accident in this type of case, I charge you this would only go to reduce damages.

Anyone who has served on a jury before may see there is a difference here and I am charging you in this type of case, that we would only have a reduction of damages and not a complete elimination of damages. I will presently charge you further on this.

Let us consider plaintiff's alternative and second claim.

Entirely apart from his unseaworthiness claim the plaintiff alleges a second claim, that the defendant shipowner was negligent. You must consider and make a separate determination as to it no matter how you decide the unseaworthiness claim. This second or alternative claim invokes a different concept of law.

Mr. Bernardini as the employee of the third party defendant ITO which had been engaged by the defendant shipowner to perform stevedoring obviously had to enter upon

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the vessel in order to do his job. Accordingly, the shipowner, entirely apart from its duty to supply a seaworthy vessel, also owed Mr. Bernardini the duty to exercise reasonable care to provide him with a reasonably safe place within which to work or carry on his duties.

The plaintiff's contention here is that the defendant breached that duty and that it was negligent. This is a term that I know you have heard before. Negligence is the failure to use ordinary and reasonable care under the given circumstances of a case. It is doing that which a reasonably prudent person or a careful person would not have done or failing to do that which such a person would have done under the given circumstances.

If the defendant was negligent and such negligence in whole or in part was the proximate cause of Mr. Bernardini's injuries, the shipowner would be liable for damages.

Here to, the plaintiff has the burden of proof. Thus, to succeed, he must establish by a fair preponderance of all the evidence the defendant's negligence and proximate cause. You will recall under the unseaworthiness claim, I charged you that it matters not whether the defendant shipowner exercised reasonable care or whether the defendant, and of course this also means the ship's

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officers, did not know of the alleged condition. If in fact a condition of unseaworthiness existed which was the proximate cause of the accident, that was sufficient to cast the shipowner in liability.

The rule under the negligence claim is different. Here the defendant cannot be held liable unless he, that is, the shipowner, knew, or in the exercise of reasonable care should have known of a claimed unsafe condition.

Plaintiff, to establish that the defendant failed in its duty, generally relies upon the same evidence offered in support of his unseaworthiness claim, but by itself, that would not be sufficient to establish the defendant's negligence.

To sustain his claim, he urges that permitting grease and oil to remain on the deck and permitting the pallets to remain on the deck, made the deck unsafe for men to walk on and that the ship's officers knew or should have known in the exercise of reasonable care that the deck was unsafe and that they should have removed the grease and oil and provided a walkway past the pallets and their failure to do so was negligence, a violation of defendant's duty to supply Mr. Bernardini with a reasonably safe place in which to work.

The shipowner also in reliance upon the same

rkrf]0

evidence which it urges negates plaintiff's claim of unseaworthiness denies it was negligent in any respect. If you so find, your verdict on this claim should be for the shipowner.

Finally, the plaintiff relies on certain regulations promulgated by the Secretary of Labor dealing with working conditions, safety devices, safeguards and equipment which the Secretary of Labor has deemed to be reasonably necessary to protect the life, health and safety of people working as longshoremen.

Among these regulations are the following regulations which were in force and effect on the day of the accident and of which the Court will take judicial notice.

The first of the regulations which the Court has been requested and does in fact take judicial notice is found in Section 1504.91A, B and C. These sections read as follows:

"Housekeeping."

The wording of subsection A is as follows:

"Weather deck walking and working areas shall be kept reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards."

Subsection B:

"Gear or equipment, when not in use shall be removed

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from the immediate work areas or shall be so placed as not to present a hazard."

Subsection C reads:

"Slippery conditions shall be eliminated as they occur."

Defendant has requested, and the Court will take judicial notice of Section 1504.2B of the regulations which reads as follows:

"Scope and Responsibility."

The wording of subsection B appears as follows:

"It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

If you find that Section 1504.19A, B or C or any one of these subsections was violated by the stevedore, their violation would render the S. S. Svensksund unseaworthy and if such unseaworthiness was the proximate cause of plaintiff's injury, it would also render the defendant shipowner liable.

If you should find that the third party defendant

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ITO violated the regulations, such conduct by ITO could also be found by you to constitute negligence.

If in turn this negligent conduct of the stevedore were known, or by the exercise of reasonable care should have been known to the shipowner and such negligence of the stevedore was a proximate cause of plaintiff's injury, then the shipowner too would be liable to plaintiff on the additional ground of negligence.

As I noted earlier, the defendant also seeks to defeat the negligence claim upon its contention that the proximate cause of the accident was due solely to Mr. Bernardini's own conduct which if you so find would defeat a recovery or if he was contributorially negligent would reduce charges.

Of course, if you find that Mr. Bernardini did not slip on oil or grease and did not trip over a pallet or pallets but laid down and pretended to have an accident, then your verdict should be in favor of the defendant.

We turn to the matter of damages.

I do this without any indication to you from anything I have said in this charge or from any questions which I asked during trial or any statements which I made during the trial to infer that you should find damages,

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but I wish to charge you as to the law and I will now charge on on the subject of damages.

If you find that the defendant was not negligent and that the ship was not unseaworthy, that is the end of the case.

If you find there was no accident, that is the end of the case. In those events your verdict must be for the defendant.

Furthermore, if you find that the defendant was negligent or that the vessel was unseaworthy or both but that nevertheless any negligence of the defendant or any unseaworthiness of the vessel which you have found was not a proximate cause of the accident, your verdict must be for the defendant.

On the other hand, if you find that the defendant was negligent and that such negligence was a proximate cause of the accident, or that the vessel was unseaworthy and that such unseaworthiness was the proximate case of the accident, then you would go on to consider the question of plaintiff's damages.

The burden of proving damages arising out of the accident is on the plaintiff.

On the subject of damages, the plaintiff testified that he sustained a serious and permanent injury to his

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right shoulder and that he sustained, according to his witness, Dr. Graubard, a 17 and a half per cent loss of use of the right shoulder and arm.

The defendant and third party defendant does dispute that the plaintiff was either injured on the S.S. Svensksund October 28, 1969 or suffered a permanent injury.

Through the testimony of Dr. Tagliabambe and Dr. Lodico, they dispute that any permanent injury resulted. They say if plaintiff was injured, that the injury was not as serious as plaintiff says it was.

There you have issues to decide, whether or not the plaintiff suffered any injury to his right shoulder and arm as a result of an accident aboard the S.S. Svensksund on October 28, 1969 and whether if the plaintiff was injured, there was any permanent injury, that is, any permanent loss of use of the right shoulder and arm.

Both sides have offered testimony and evidence on the subject including as I adverted to a few minutes ago, testimony from the plaintiff and Drs. Graubard, Tagliabambe and Lodico. I will not discuss that testimony and evidence in detail. Here again, it is your recollection of the evidence which governs and it is for you to say what weight you will give to the testimony you believe if

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you reach that point in your deliberations.

From time to time in this case, items of testimony were stipulated and matters were introduced to you as being undisputed. The parties have stipulated that as of the date of the accident, Mr. Bernardini had a life expectancy of 28.56 years and a work expectancy of some 21 and a half to 22 years.

When matters are undisputed, you will accept the stipulation as accurate and accept the facts as stipulated.

If you find that any of the plaintiff's injuries are permanent, you must make such allowance in your verdict as you think that circumstance warrants, taking into consideration the period of time that has elapsed from the date of the injury to the present time and the period of time plaintiff can be expected to live. In this connection, it is pointed out to you that according to the mortality tables, plaintiff has a life expectancy calculated from the date of the accident of 28.56 years. Such tables are of course nothing more than statistical averages. They neither assure the span of life that I have given you nor assure that the span of plaintiff's life will not be greater.

The life expectancy figure I have given you is not binding upon but may be considered by you together

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with your own experience and the evidence you have heard concerning the condition of plaintiff's health, habits and employment and activities in determining what the plaintiff's present life expectancy is.

In addition, assuming for the moment that the accident is found to have occurred and assuming for the moment that you find that plaintiff is entitled to collect from the defendant, plaintiff is entitled to be reimbursed for the loss of earnings he has suffered as a result of any injuries you find resulted from an accident on October 28, 1969 aboard the S.S. Svendsksund. He is entitled to be reimbursed for loss of earnings from the time he was injured to the present date and if you find that as a result of his injuries he has suffered a diminution of his earning capacity for such diminution in the future.

Any award you make for earnings lost to date may not be speculative, but they must be calculated from the number of weeks and days that you find plaintiff was disabled by his injuries from carrying on his work and the amount that you find he would have earned in that period had he not been disabled.

Any award you make for diminution of plaintiff's earning capacity in the future should be determined on the basis of his earnings prior to the injury, the condition

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of his health, his prospect for advancement and the probabilities with respect to his future earnings prior to his injuries; the extent to which you find those prospects or probabilities have been diminished by the injuries, the length of time you find plaintiff would reasonably be expected to work had he not been injured, the nature and hazards of plaintiff's employment and any other circumstances which would tend to increase or decrease plaintiff's earning capacity.

In this connection, I point out to you that plaintiff was at the time of the accident between 43 and 44 years of age and had a work expectancy of some 21 years. Such a figure is of course nothing more than a statistical average. It neither assures the plaintiff will have the span of working life I have given you nor assures that plaintiff's span will not be greater. The figures I have given you are not binding upon you but may be considered by you in connection with your own experience and the evidence you have heard in determining what plaintiff's work expectancy is.

If you find that plaintiff is entitled to an award for diminution of his earning capacity in the future, you will fix the dollar amount of such diminution over the entire period that you find plaintiff suffered such

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diminution and include that amount in your verdict if you find for the plaintiff.

Your end here is to award a sum of money which would be fair and reasonable compensation for the plaintiff if you find he sustained an injury aboard the S.S. Svensksund on October 28, 1969.

You may take into account the nature and extent of his injuries, whether they are temporary or permanent in character, the pain and suffering entering into it, what you consider to be reasonably certain that he would be called upon to endure in the future and the wages he has lost and is reasonably certain to lose in the future.

The plaintiff claims he was unable to work from October 28, 1969 the date of the accident to December 11, 1969 and for some 12 to 15 days intermittently thereafter. He states as I recall the statements of his own counsel and his own testimony, he earned on the average of $160 to $180 per week prior to the accident.

The plaintiff may only recover the wages lost by his being disabled. In this connection, you must weigh the testimony of the plaintiff and of the doctors who testified as well as the exhibits regarding his ability to work. His medical expenses, as I recall them were approximately $145.

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The defendant and third party defendant contends that the plaintiff could have returned to work earlier than he did. It is your recollection that governs and you can go back to the testimony and exhibits on this if you choose to.

Of course, the fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to prevail. Instructions as to the measure of damages are given for your guidance in the event you find that the evidence is in favor of the plaintiff. I will now go to the question of whether the plaintiff himself contributed to the accident and if so, to what extent.

Mr. Bernardini was under a duty to exercise reasonable care for his own safety. He was under a duty to take such measures and action for his own safety as you would expect any reasonably prudent person to take under such conditions.

Should you find that the accident was contributed to in part by Mr. Bernardini's own negligent conduct, then there must be a proportionate reduction in the amount of damages awarded to him.

The defendant, as you know, makes such a contention and urges it upon you in addition to its other contentions.

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The plaintiff denies that he in any way contributed to the accident. Inasmuch as it is disputed, we have an issue for you as the triers of the fact.

On this issue of contributory negligence, the burden of proof is on the shipowner to sustain its claim of contributory negligence by a fair preponderance of the evidence. Just by way of example, should you find that the defendant has sustained its burden and that Mr. Bernardini was negligent and by such conduct contributed to the accident say 10, 20, 30, 40 or 50 per cent as you may find, then you must reduce damages accordingly.

Of course, if you find Mr. Bernardini was not negligent, you should make no reduction and award total damages as you determine them. You may not add any sum to the amount of your verdict for state or federal income taxes as the amount recovered by the plaintiff is not taxable income.

So much for the case against the defendant shipowner. Obviously you will reach the issues in the case of the shipowner against ITO, the third party defendant only in the event you have found that an accident occurred and that the shipowner is liable for the plaintiff.

The shipowner's position is that if it is called upon to pay damages to the plaintiff, this is because of

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the breach of warranty of workmanlike performance by the third party defendant ITO which in performing maritime services for and in the vicinity of the S.S. Svensksund, warranted to the shipowner that its work would be performed in a safe, proper and workmanlike manner.

If you find that ITO, the third party defendant breached this warranty, that is, that it failed to perform its services in a safe, proper and workmanlike manner and that as a result Mr. Bernardini sustained injuries, the shipowner contends that it is entitled to recover indemnity from the third party defendant ITO for any amount it is called upon to pay Mr. Bernardini.

In other words, the shipowner is entitled to be made whole for damages awarded against it in favor of the plaintiff.

The obligation owed by ITO, the third party defendant to the shipowner was to perform its work with reasonable safety and in a proper and workmanlike manner. This relates not only to the handling of the cargo but also to the use of all equipment incident thereto.

The shipowner contends if it is found liable to the plaintiff, it is because ITO breached its warranty of workmanlike performance.

The shipowner contends that if the accident

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happened, it was due to the unsafe, improper and unworkmanlike manner in which ITO's employees performed their work.

Essentially, the shipowner's claim is that ITO was negligent. ITO denies all these contentions.

Now, the law does not require perfection. ITO contends that it performed its work in a reasonably competent manner and accordingly, it urges that the shipowner is not entitled to any indemnity. The shipowner has the burden of proof of establishing that ITO breached its warrant of workmanlike performance by a fair preponderance of the evidence. ITO's warranty of workmanlike performance required it to see that its stevedores worked under reasonably safe conditions and if the working conditions were unsafe, ITO was under a duty to discontinue operations on its own initiative as soon as it knew or should have known it would be unsafe to continue. Failure to suspend operations when it was unsafe for the men to continue their work, if you do so find, would constitute a breach of the warrant of workmanlike performance, even if you find the shipowner was responsible for the underlying conditions.

ITO's warranty also extended to its employees and warranted that they be employees who would not be negligent in the performance of their duties. Ordinarily,

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if you find negligence on the part of any officer of ITO or by fellow workers of Mr. Bernardini or negligence by Mr. Bernardini which acted or contributed to the accident, then you have sufficient evidence upon which to find ITO breached its warranty of workmanlike performance to the shipowner.

The failure of the shipowner to discover and correct any breach of warranty by ITO, the third party defendant, affords no defense to the shipowner's claim.

If you find upon all the evidence that the shipowner has established that ITO violated the warranty of workmanlike performance which casts the shipowner in liability to the plaintiff, the shipowner is entitled to recover indemnity unless the shipowner by some action or inaction on its part prevented, hindered or seriously handicapped ITO in performing its workmanlike job or fulfilling its obligations.

However, to avert the shipowner's right to indemnity, the burden of proof by a fair preponderance of the evidence is upon ITO to establish that the shipowner was guilty of such negligence barring a recovery. That is upon all the evidence if you find that ITO was not responsible, that it has sustained its burden of proof for any condition by reason of which you have awarded

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plaintiff a recovery against shipowner, then the shipowner's claim for indemnity should be denied.

If the shipowner has sustained its burden of proof, your verdict will be in its favor. If it failed, your verdict will be in favor of the third party defendant ITO. So to, if ITO has carried its burden of proof to defeat the shipowner's claim for indemnity, likewise it would be in favor of ITO.

To decide fact issues, you are called upon to determine the credibility of witnesses. Some witnesses were contradicted by other witnesses and in some instances witnesses made contradictory statements. At the very start of the trial before a single word of testimony was taken, I told you that you were to be the judges of the facts. This includes judging credibility and determining the credibility of each witness and this applies to experts as well as to so-called fact witnesses. You consider the witness' demeanor before you, how they impressed you, their interest if any in the case or in the parties to the litigation, whether they were frank and forthright or evasive or tended to cover up some matters, whether there was a motive for falsity.

You may take into account opportunity or observation as to matters which were the subject of his testimony.

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In short, in determining whether a witness' testimony is credible, that is, acceptable to you, what you do is size him up to determine whether he is reliable and trustworthy as a witness.

If you find that any witness, and this applies to the plaintiff, the defendant, the third party defendant's witnesses testified falsely as to any material fact at trial, at examinations before trial or in other prior statements, you have the right to reject the testimony of that witness in totality or you may accept that part or portion of his testimony which commends itself to your belief or which you may find corroborated, that is, supported by other evidence in the case.

However one might sympathize with the plaintiff, he may not recover unless just as every other plaintiff in a civil action, unless he sustains his burden of proof. If he does, he is entitled to recover. The fact that defendant and the third party defendant are corporations, should not enter into your deliberations. All litigants stand as equals before the Bar of Justice. Justice cannot prevail if sympathy or prejudice enter into your deliberations.

The oath which you took at the outset of this trial was to render justice fairly and impartially without

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fear or favor and to decide the issues, the fact issues solely upon the evidence in this case and in accordance with the Court's instructions as to the law.

Each juror is entitled to his or her opinion but you are required to exchange views with your fellow jurors and that is the very purpose of jury deliberations. It is your duty to discuss the evidence if you have a point of view and if after reasoning with your fellow jurors it appears your judgment is open to question, then, of course, if you are persuaded, there is no reason why you should not change the point of view originally held by you, but always it must reflect your own conscientious judgment as to how the case should be decided upon the facts and the law.

To return a verdict, it must be unanimous.

I have indicated in my charge that there are a number of issues here and a number of questions. The real issues are not simple and therefore to assist you, I have prepared a form of verdict which contains eight separate questions. You will take the form into the jury room. In order to simplify matters even further, I suggest that if you find there was no accident aboard the S.S. Svensksund on October 28, 1969, you need not use the form.

If you find there was no accident, you should return

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to the court room and report we find for the defendant.

If you find that there was an accident aboard the S.S. Svensksund on October 28, 1969, you should proceed to answer the questions on the form.

I think you will find that the form itself is self-explanatory and it has directions on it relative to whether you are to answer a particular question with either a yes or no answer or with a marking, an X or with a dollar sign or with a percentage.

I have used these forms in the past and I find that they are helpful so far as the jurors are concerned.

At this point, I would suggest to you that I have completed my charge. I will, before I permit you to retire to the jury room, confer with counsel relative to the charge.

At this time I would suggest that the two alternate jurors go into the jury room and take out your clothing and bring it back to the jury box -- you have it already.

In the meantime, I will retire hopefully very briefly to the robing room where I shall confer with counsel and as soon as we have finished our conference, I will permit the jury to retire to deliberate on this case.

(In the robing room.)

THE COURT: Gentlemen, are there any exceptions

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to the charge, any requests that you wish to make at this time?

MR. AUSLANDER: Am I first?

THE COURT: I would suggest that you should go first.

MR. AUSLANDER: Your Honor, we respectfully except to that portion of the charge where you told the jury in words or substance that if they find that the grease or oil on the deck was a temporary condition, that would not make the vessel unseaworthy and I believe that is directly contra to the holding in the Mitchell case and all cases stemming therefrom on transitory conditions.

THE COURT: Anything else?

MR. AUSLANDER: Yes. You also charged the jury in words or substance and discussed with them what you denominated as operational negligence which in effect is the holding in the Unser case, a momentary step or failure as an isolated condition but my understanding of that case and the cases that follow it, talk about gear of the stevedores or positive or affirmative acts by the longshoremen directly leading to the injury.

I don't think we have situation here and I believe it was misleading to go into that aspect.

That is all.

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THE COURT: Thank you.

Let me pass now to the defendant.

MR. STEARNS: Your Honor, I note an exception to the charge that the violation of the safety regulation renders the ship unseaworthy. If I heard properly, you charged that negligent conduct by the stevedores in violation of the regulations makes the shipowner liable in negligence and I think that is also improper.

THE COURT: I charged from Provenzo on that and what I did say in essence was that if they find that the stevedore violated the regulations, such conduct by the stevedore could also be found by them to constitute negligence and if in turn this negligent conduct of the stevedore were known or by the exercise reasonable care should have been known to the shipowner and such negligence of the stevedore was a proximate cause of plaintiff's injury, then the shipowner too would be liable to plaintiff on the additional ground of negligence. That was the charge as I gave it and I assume from this morning and again from what you have said now that you except to this portion of the Court's charge.

MR. STEARNS: That is correct.

Also there was no medical testimony and no testimony from the plaintiff as to any diminution of wages.

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I object, therefore, to the charge in chief on any diminution of earning capacity and I also note a failure of the Court to comment on the fact that the man has had three subsequent accidents, although the Court did ask the jury to consider the various other factors that might bear on such loss of earning capacity.

THE COURT: I indicated that you gentlemen had spent a fair amount of time with your closing arguments and of course I directed the jury to consider everything in the case.

MR. STEARNS: The other thing is and I object to this in every situation, it seems, I object to starting contributory negligence at 10 per cent rather than 90 per cent and limiting it to 50. In this case, particularly 90 would be a fairer starting point.

MR. TESTA: You should have charged at zero to 100 and not stopped at 50.

MR. STEARNS: I agree with that.

As far as the third party action, I note in view of the charge as I mentioned before, the plaintiff's case against the defendant of the applicable regulations, I would ask the Court to charge that a violation of the regulations is a violation of the warranty of workmanlike performance if the stevedore is found to have violated the

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regulations and in this I point out that the regulations are mandatory as they apply to the stevedore. In other words, slippery conditions shall be corrected as they occur.

I would also ask the Court to comment on one thing that is in the case without contradiction which I did not mention in my summation, that the pallets were laid down by the stevedore in view of the fact that there has been fairly ample comment on other facets of the case.

I also request the Court charge that the stevedore has a duty to inspect the work areas and has a duty to correct and failing correcting, to stop work in a situation where there is an open and obvious condition.

I think clearly in cases where there are five or six or seven heelmarks, the stevedore has a duty to determine whether such things are present even though the inspection may be merely cursory and the testimony in this case about the presence of safety men is to see that these regulations are in force.

In view of the fact that plaintiff claims two conditions which were open and obvious, although he claims the cracking of the boom caused him not to see them or pay attention to them, it is the stevedore's duty to inspect, correct those situations which, believing plaintiff's story, are violations of the regulations.

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THE COURT: In the facts of this case, however, where your chief mate was responsible for the care and maintenance and appearance of the deck area, was on deck within 20 feet of the accident and walked around this area some four times, I think a charge such as you suggest would be inappropriate. I just have to take the facts of the case and weigh what I think is a proper charge and in this case based on the facts as I heard them, I felt that the charge as given was fair.

Anything else?

MR. STEARNS: Can I make one comment on that. Captain Wheeler testified that the chief mate was responsible among other people for seeing to the safety condition of the decks and of course the other people are the ITO people.

MR. TESTA: There was no testimony in this case --

THE COURT: You will have your chance.

Is counsel finished?

MR. STEARNS: Yes.

THE COURT: You have excepted to various portions of the charge, Mr. Stearns. The Court will not amend or supplement the charge. You have your exceptions.

MR. AUSLANDER: Is that same ruling for me because you didn't say anything after you finished.

THE COURT: I don't know that I have to but I

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will say it for you as well.

MR. TESTA: If I may be heard at this time as far as exceptions to your Honor's charge, I would like to except to the fact that you only mentioned figures like 10 to 50 whereas I suggested your Honor should have told them they could find 100 per cent contributory negligence if it should be a defendant's verdict.

Your Honor should not charge at 50 per cent. This only suggests to them they could find a range of between zero and 100 per cent.

THE COURT: I don't regard giving the jury an example as I did quite clearly as being a suggestion or direction just as I wouldn't think I should direct them to find 100 per cent, but proceed.

MR. TESTA: Not direct them, but tell them they could find from zero to 100.

As far as the Provenzo case is concerned, I would like to renew my exceptions to your Honor's charge as not being the law in this circuit with respect to violations of the regulations as being in any way binding on the shipowner.

I believe thatyour Honor indicated when we went over my request to charge that you were going to charge my additional request No. 14 but listening very carefully

to you I did not hear any comment with respect to that.

THE COURT: If I indicated I would charge it, I would suggest that you show it to me since you have it in front of you.

I indicated I was going to charge that in substance and I believe I did. Perhaps not in the words you indicated, but I think I charged it in substance.

To the extent I didn't charge it in haec verba, you have your exceptions.

MR. TESTA: I don't think you mentioned it at all if I may say that for the record.

I would also like to take exception to your Honor's charge with respect to conduct on the part of the shipowner sufficient to preclude indemnity. I don't think your Honor covered that other than the very narrow scope and very briefly and I take exception to the manner in which your Honor charged it.

THE COURT: Anything else?

MR. TESTA: I would ask your Honor to charge the jury under the facts of this case, they may take into consideration the fact that the chief mate was there at the time and was within a few feet of the accident, did not see any oil or grease and did not think there was anything wrong with the pallet walkway. They might take that into

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consideration.

THE COURT: Is there anything else?

MR. TESTA: No, your Honor.

THE COURT: I will decline to either supplement or amend my charge. You have your exceptions.

MR. STEARNS: I think I did hear a charge that the negligence of the plaintiff himself would be a breach of warranty.

THE COURT: Yes, that is in there.

MR. STEARNS: I think I will object on the same basis as to the way the contributory negligence was charged.

THE COURT: You have your exception.

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(In open court:)

THE COURT: Ladies and gentlemen, I have concluded my meeting with counsel and can report to you that I am now going to present the case to you, suggest that you go into the jury room, thatyou deliberate.

You may have any exhibits you wish which are in evidence, just send us a note. If you wish any testimony read back, send us a note on that.

Incidentally, that is the way you communicate with the Court, just write out a note setting forth your request, send it out and we will either respond by sending something in if you want something brought in or alternatively, if you want testimony read, we will have you out here and our court reporter will read back whatever you wish.

I am now going to hand you the special verdict form, Madam Forelady and remind you again as I did in my charge that you will take the form into the jury room with you and as I have indicated, if you find there is no accident, you need not use the form.

If you find there was no accident, you should return directly to the courtroom with a verdict.

If you find there was an accident, you should proceed to answer the questions on the form.

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At the same time, I think you can appreciate that the presence of alternate jurors is most important in each case for if you were not here and someone of the jurors became ill or disabled in some way, we would be faced with a mistrial and we would have to utilize this time which we have put in here in this case. We would have to try the same.

And to try the same case twice is at least somewhat of a loss as far as the Court's time and the time of the personnel and the lawyers is concerned.

I do want to thank you very much for the week you spent with us and or the time you gave to this case just as with the other jurors.

Just as with the other jurors, you came early each session and there was one instance where we stayed rather late in the afternoon.

So for the contribution which you have made to our form of participatory democracy, I think you both and wish you well.

(Alternate jurors excused.)

(Recess.)

(Note received at 4:50 p.m.)

THE COURT: The jurors would like to know how long they will be in the jury room tonight.

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May I suggest that we indicate to them that we do not expect them to remain tonight beyond 5:30.

Is that satisfactory to all counsel?

MR. AUSLANDER: Yes.

MR. STEARNS: Yes, your Honor.

MR. TESTA: Yes.

THE COURT: I think if it is satisfactory to you all, we will have the deputy marshal merely advise them that they will not be expected to deliberate beyond 5:30 tonight.

Is that satisfactory, gentlemen?

MR. AUSLANDER: Yes.

MR. STEARNS: Yes.

MR. TESTA: Yes.

(Recess.)

THE COURT: Gentlemen, the Court has received its first note from the jury.

The note reads as follows:

"Your Honor, how long has Mr. F. Bernardini been working for ITO?"

Signed Forelady N. Farrow.

I don't believe there is anything in the record relative to that question.

MR. TESTA: I think the testimony was he was

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a casual employee, he was just working for them that day, an extra man in the gang.

THE COURT: He had shaped up. His regular gang wasn't working and he had shaped up that day and was sent there. It says on October 28, 1968 he went to the hiring hall to shape up. He was given a job to work for ITO at 21st Street, Brooklyn.

MR. TESTA: That is right.

MR. STEARNS: That doesn't mean necessarily he didn't work for ITO the day before or wasn't in a gang regularly employed by ITO.

MR. TESTA: There was no testimony.

MR. STEARNS: And there is no testimony we can use to answer the question how long was Frank Bernardini employed by ITO.

Q What about the earnings records which are in evidence as Exhibit H.

MR. STEARNS: They don't indicate anything.

MR. TESTA: I think in answer to that question, you have to say he was working for them that day on the basis of the testimony in this record.

MR. STEARNS: What I am saying, there is nothing on this record that answers that question. Secondly, I don't see how it is relevant.

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THE COURT: I think we have to answer it as far as the record reflects on October 28, 1969, Mr. Bernardini went to the hiring hall to shape up and was given a job to work for ITO at 21st Street in Brooklyn. He went to the timekeeper's office and got a hiring card which would mean to me that he hadn't worked on that pier before.

MR. AUSLANDER: That doesn't necessarily mean that.

THE COURT: If you have anything else, Mr. Auslander, I will give it.

MR. AUSLANDER: I go along with what both counsel said, that on that date he did testify that his gang was not working, he went to the hiring hall to shape up. He went to the pier to work for ITO but again it does not answer the question how long he had been working for ITO per se, because he could very well, although again there is no testimony one way or the other, he could very well be working for them a day before a year.

MR. TESTA: There is no testimony in the case. All your Honor can tell them is that on that day he shaped up and worked for them that day and there is nothing else. There is nothing else in the record that shows anything else and we can't speculate that he could have worked for them some other time.

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MR. STEARNS: You can't answer the question the way it is posed.

MR. TESTA: Five minutes according to the testimony in this case.

MR. STEARNS: If that is the question, I don't think that is the only inference.

MR. TESTA: It is a question of testimony.

MR. STEARNS: On the record as I understand it, I don't think we can do that.

THE COURT: I am going to answer the question as follows:

Members of the jury, on October 28, 1969, Mr. Bernardini shaped up and was given a job working for ITO at 21st Street, Brooklyn.

Is that satisfactory?

MR. TESTA: Yes, your Honor.

MR. AUSLANDER: That is a fair statement of the testimony so far.

MR. STEARNS: Your Honor --

THE COURT: You find it to be an unfair statement?

MR. STEARNS: I am not quarreling with the accuracy of the statement. I don't believe it is a response to the question.

THE COURT: It is the best we can do on the basis

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of the record.

MR. STEARNS: I will except to that answer.

THE COURT: Then I won't send it in. I will bring them out here and I will tell them just that.

If you except to it I won't send it in.

MR. STEARNS: Can we just say that he shaped up and was working for ITO and there is no testimony whether he worked for ITO, or there is nothing in the record to indicate whether he worked for ITO before or since?

MR. TESTA: I don't think it is necessary to say that. I think what your Honor is going to tell them is all that the record reflects and they should not be permitted to speculate or draw any inferences about any prior employment because there is no testimony on it.

As is the record in this case, he worked for them for five minutes and that would be a fair statement of what the record shows in this case and nothing else.

THE COURT: That is why I prefer jut to answer that on October 28, 1969 Mr. Bernardini shaped up and was given a job working for ITO at 21st Street in Brooklyn. I think that is the testimony.

MR. STEARNS: I will withdraw my objection.

MR. TESTA: In answer to how long, the answer is

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five minutes.

THE COURT: I don't think we should get involved in that.

In other words, this is the affirmative testimony. Leave the rest to the jurors.

Do you agree?

MR. TESTA: I think they were asking how long in point of time. On that day the record clearly shows he was only on the ship for 5 minutes.

THE COURT: They don't ask for that day. That has been driven home to them by all counsel.

If counsel agree, I would prefer to answer the question as indicated.

Members of the jury, on October 28, 1969 Mr. Bernardini shaped up and was given a job working for ITO at 21st Street, Brooklyn.

MR. AUSLANDER: Aboard the Svensksund.

THE COURT: I can put that in.

MR. STEARNS: The question is how long he worked for ITO, not where.

THE COURT: Why don't we leave it the way I had it.

MR. STEARNS: I will withdraw my objection.

THE COURT: Is that satisfactory?

MR. TESTA: Yes.

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MR. AUSLANDER: All right, your Honor.

THE COURT: I will send the following note into the jurors.

October 23, 1973, 5:35 p.m.:

Members of the jury, on October 29, 1969 Mr. Bernardini shaped up and was given a job working for ITO at 21st Street, Brooklyn. Robert J. Ward, United States District Judge.

Is that satisfactory?

MR. AUSLANDER: Are you just going to do that and discharge the jury?

THE COURT: I will do that orally instead of giving them a note and would you mark the first note as Exhibit 1 and I will speak to the jury rather than write a note.

(Court's Exhibit 1 was marked.)

THE COURT: As to tomorrow, I would like the jurors to return at a quarter of ten. I would like to get them in and get them settled.

My instructions to them will be to return tomorrow morning at 9:45 a.m. to continue their deliberations.

MR. AUSLANDER: Would your Honor instruct them not to start deliberations until all are present?

THE COURT: I certainly will.

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(Jury present.)

THE COURT: Ladies and gentlemen, I have received the following note from the jury which I have marked Court's Exhibit 1 for identification.

"Your Honor, how long has Mr. F. Bernardini been working for ITO?" Signed the Forelady N. Farrow.

Ladies and gentlemen of the jury, I have conferred with counsel. We have searched our recollections and the best we can do relative to an answer is as follows:

On October 28, 1969, Mr. Bernardini shaped up and we given a job working for ITO at 21st Street, Brooklyn.

We have given you our recollection of the testimony. If when you return tomorrow morning you want that or any other portion of the testimony read which may have further information which would enlighten you relative to this or other questions, it will be available for you tomorrow morning. The answer we have given you this evening is the best we can give you from our collective recollections.

At this point, I am going to excuse the jury. Go home. Please do not discuss this case with anyone including those people who would be waiting for you at home anxious to find out what happened here today. Please do not discuss the case with anyone and when you assemble

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here tomorrow morning if one or two or three of you come in first, please do not begin your discussion of this case until all six of you are in the room.

I am going to excuse the jury now and direct that you return tomorrow morning at 9:45 a.m. to begin your deliberation.

I have set it at 9:45 and I have asked counsel to be here, but I want to indicate something.

I am supposed to start my next trial at 10 a.m., therefore I want you to be in all assembled and for you to get started. It may be because the first step as you know in connection with the trial is the impanelling of a jury, it may be that I will not be able to respond to notes from you immediately, so you might keep in mind that in those first 15 minutes, if you want anything in particular, communicate with me by note promptly.

May I suggest one other thing that may make it easier.

Gentlemen, if the jurors request any exhibits which are presently in evidence, do all counsel consent that those exhibits which are requested by the jurors may be sent into them without our bringing the jury out or assembling in any more formal way tomorrow morning?

MR. AUSLANDER: That is acceptable to the plaintiff

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and as a matter of fact, your Honor, I think we gave them all to Miss Cruger earlier so she has them in her possession.

THE COURT: Is that procedure acceptable to defendant and third party defendant?

MR. STEARNS: Yes.

MR. TESTA: Yes.

THE COURT: In the event you should want any exhibits, we have counsel's consent. You need only send out a note and Miss Cruger will see to it that the exhibits are delivered to you immediately.

We will assemble again tomorrow morning at 9:45 a.m. and you will continue your deliberations.

In the meantime as I say, do not discuss the case with anyone and do not resume your discussions of this case until you have all assembled in the jury room tomorrow morning.

Goodnight.

(Adjourned until 9:45 a.m., October 24, 1973.)

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October 24, 1973
9:45 a.m.

(A note was received at 10:10 a.m.)

(Court's Exhibit 2 was marked.)

THE COURT: I have receive a note from the jury which we will mark as Court's Exhibit 2 for identification. The note states as follows:

"Your Honor, may we see the Department of Labor doctor's report;Forelady N. Farrow."

Which exhibit is that? Plaintiff's Exhibit 1.

Let everyone see it and if there is no objection, we will send that document into the jury room since it appears to have been admitted into evidence.

MR. STEARNS: We of course again take notice of my objection to the admission of this report in evidence, but since it is in evidence, it is clearly what they are referring to.

THE COURT: I recollect there were objections interposed at the time the document was offered. Of course you have those as a standing matter.

However, since the document is in evidence, I assume we all agree that this is the document the jurors have requested and therefore I will have the document sent into the jury.

MR. AUSLANDER: Yes, your Honor.

rkbr 15 MR. STEARNS: I agree that is what they have requested.

(Recess.)

(10:50 a.m., a note was received from the jury.)

(Court's Exhibit 3 was marked.)

THE COURT: Gentlemen, the Court has received another note from the jury which I have marked Court's Exhibit 3. The note reads as follows:

"Your Honor, we would like to hear the portion of the Judge's charge dealing with damages, Forelady N. Farrow."

I requested Mr. Kaufman our court reporter to take out the portion relating to damages. He has done so. He will begin with the sentence which reads "The burden of proving damages arising out of the accident is on the plaintiff."

That is where I begin my discussion of damages.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen. I notice that you have been deliberating for some time. We received one note from you earlier. I conferred with counsel and we sent in the exhibit which the jury requested. We have now received a second note which reads as follows:

"Your Honor, we would like to hear the portion

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of the Judge's charge dealing with damages,"signed "Forelady N. Fargo."

I have asked Mr. Kaufman, our very able court reporter, to take his notes and he has located the portion of my charge which relates to the matter of damages and he shall now read it to you and I will be sitting here following my own notes on the subject and when that matter is concluded, you will retire to your jury room to continue your deliberations.

We will begin now with Mr. Kaufman reading that portion of the charge dealing with damages.

(Portion of the charge read.)

THE COURT: Mr. Kaufman has now completed reading that portion of my charge which relates to the matter of damages and I will direct the jury to retire to resume their deliberations.

In the event you wish to have any of the additional evidence sent in to you, you may send out a note.

Let me give you some thoughts timewise.

As you know, I have another case with another jury. I am going to have you continue your deliberations until 12:30, at which time I will have you taken to lunch by the marshal.

I will not be available to you from now until you

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do go to lunch.

YOu should, judging from our experience, require approximately an hour and a half to get from the courthouse down the elevators to your lunchon place. You will be eating as a group. You will be served your lunch, then to return here to continue your deliberations, so I will instruct counsel to return here at 2 p.m. in order to be available to you.

I will arrange that the other jury which has been impanelled come back somewhat later than that so we will try to keep the matters moving.

Please continue your deliberations.

In the event one of you has to step away from the table leaving the room, please wait for a moment or two because it is important that you all deliberate together.

When you proceed to lunch and if you are at separate tables, my own suggestion to jurors is, since the marshals are present, they not discuss the case over lunch; that when you do go to lunch, concentrate on ordering, on eating and then when you return from lunch and you are all together in the jury room you can continue your deliberations.

(Jury leaves the courtroom.)

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(Recess.)

(At 2:25 p.m., the jury announced it had reached a verdict.)

(Court's Exhibit 4 was marked.)

(In open court; jury present.)

Good afternoon, ladies and gentlemen of the jury.

I have been advised that the jury has reached a verdict and I have here a note which I will look at first.

The note has been marked as Court's Exhibit 4.

"Your Honor, we have reached a verdict. How is it to be presented? Forelady N. Farrow."

My resonse to that will be Miss Cruger who takes the verdict in this court will query you on that and I think you will find her questions will be quite clear and if you Madam Forelady would answer those questions, the verdict will be rendered in the way which we believe is satisfactory and proper.

THE CLERK: Members of the jury, will you please answer as your name is called.

(Jury roll called; all present.)

THE CLERK: No. 1, has plaintiff Frank Bernardini established his claim that the S.S. Svensksund was in an unseaworthy condition and that this unseaworthiness was the proximate cause of plaintiff's accident? Yes or no.

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THE FORELADY: No.

THE CLERK: Has plaintiff established his claim that the defendant Rederi A/B Saturnus was negligent and that its negligence was the proximate cause of the plaintiff's accident, yes or no?

THE FORELADY: Yes.

THE COURT: Proceed to question 4.

THE CLERK: What is the total amount of damages to plaintiff?

THE FORELADY: $10,000.

THE CLERK: Do you find that the defendant has established his claim that the plaintiff was himself negligent and that this negligence was the proximate cause of the accident?

THE FORELADY: No.

THE COURT: I would assume, Madam Forelady, there is no answer then to any part of question 6?

THE FORELADY: (No response.)

THE COURT: Let us proceed to Questions 7 and 8, Miss Cruger.

THE CLERK: The dollar amount?

THE FORELADY: On Question 4 total, we have $10,000. On Question 6 total we have nothing. Net recovery $10,000.

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THE COURT: In other words, you start out with Question 4 $10,000 minus Questin 6 which is zero, net recovery $10,000.

THE CLERK: Did the defendant establish his claim that third-party defendant ITO breached its warranty of workmarnlike performance, yes or no?

THE FORELADY: No.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say that you find that the plaintiff has not established his claim that the S.S. Svensksund was in an unseaworthy condition; that plaintiff has established his claim that the defendant Rederi A/B Saturnus was negligent and its negligence was the proximate cause of the plaintiff's accident; that the total amount of damages to the plaintiff is $10,000 and the defendant did not establish his claim that third-party defendant ITO breached its warranty of workmanlike performance and so say you all?

THE COURT: Does any party wish to have the jury polled?

MR. STEARNS: Yes, defendant would like the jury polled.

THE COURT: Anyone else join in that request?

MR. TESTA: No, your Honor.

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MR. AUSLANDER: No.

THE COURT: Just ask them if this is their verdict and go right down the line.

THE CLERK: The verdict as I have just read to you, is that your verdict?

(All jurors having been asked the question, "Is that your verdict" answered in the affirmative.)

THE COURT: The Court instructs the clerk to record the verdict.

At this point, ladies and gentlemen, I have the verdict which has been filled out and presented to the clerk, it will be makred as a Court's exhibit.

I presume what you have handed the clerk is the verdict?

THE FORELADY: Right.

(Court's Exhibit 5 was marked.)

THE COURT: At this point the Court would like to thank the jurors in this case.

As I said to the two alternate jurors at the time they were discharged, you have performed a duty in citizenship. You have performed a valuable function within this community and that is, to participate in our form of democracy.

Today our method of government is under consider-

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attack on one form and one side and another in form and side. It would seem to me that the best form of democracy is where the citizens participate. In this process, you, the six of you participated. You have heard evidence, you have deliberated, you have rendered a verdict, you have done your job in the administration of justice and as I discharge you, I wish to thank you for the time and the attention which you have given to this case on behalf of the Court and all counsel and the parties.

I thank you and I discharge you.

My understanding is the jury will now be leaving. I understand you will not be required to return for the balance of this term.

MR. AUSLANDER: On my own behald and Mr. Bernardini's behalf, I would like to thank the jury.

MR TESTA: And I or behalf of ITO would like to thank the jury.

THE COURT: Good luck ladies and gentlemen, and thank you.

(Jury excused.)

THE COURT: The jury has now left the courtroom and I would inquire whethercounsel have any applications which they wish to make to the Court.

MR. STEARNS: On behalf of defendant, we would

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like the statutory ten days for motions.

I have drawn a picture of the diagram. Mr. Auslander tells me he doesn't feel it is appropriate to draw a picture. He would want another photograph.

THE COURT: Counsel in the other case, will you be needing the blackboard for your case?

All right, may I suggest that you perhaps with some help can move the blackboard into the witness room and I would suggest just putting a note on it, please do not erase, tnen it will beout of the sight of this jury and when your man comes to take the picture after it is taken, would you let Miss Cruger know then we will erase it and use it in connection with other matters.

You have made an application for ten days to make appropriate motions. The application is granted.

MR. TESTA: If your Honor please, at this time on the basis of the juror's finding of no contributory negligence on the part of the plaintiff and finding No. 8 that plaintiff did not establish its claim that the third-party defendant breached its warranty of workmanlike performance, I move to dismiss the third-party complaint both as to indemnity and counsel fees.

MR. STEARNS: We oppose the motion. Obviously that is what the jury's verdict is. I think

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it is premature until the Court has considered our motion, post trial motions.

THE COURT: Although I must say, Mr. Stearns, on the basis of the jury's verdict, I am disposed to grant counsel's application since you are making a motion addressed to a number of facets of the case.

I would be willing to defer my decision on the motion which I must say I feel is quite warranted and justified by the jury's verdict.

I would be willing to defer that decision until I have read your papers.

I would request in that regard, Mr. Testa, that by some writing when you get counsel's papers in noting your opposition to counsel's motion, renew our cross move as you have just moved orally and then when I determine his motion, I will determine your motion.

MR. TESTA: I will do that.

THE COURT: When you get his papers, you may have five days thereafter to cross.

Is that satisfactory?

MR. TESTA: Yes.

THE COURT: Anything else? There being no further questions pending in connection with this case, I recess court.

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WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Frank Bernardini	28	55		
			225	229
Dr. David J. Graubard	86	101	126	137
			140	
Rune Stahl	253	289		
		370	412	435
Mario F. Tagliagambe	302	312	348	354
Charles Graziano	455	462	473	474
William Wheeler	476	482	508	511
Dr. Vincent Lodico	523	528		

EXHIBIT INDEX

Defendant Rederi	Identification	In Evidence
A	101	
B	101	
C	256	256
Third Party Defendant		
A	304	
B	458	
F	416	417
G	417	426

EXHIBIT INDEX

Defendant	Identification	In Evidence
H	447	448
Plaintiff		
1	326	342
2	332	335
3	541	713
4		716
5		719